SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 954

UNITED STATES OF AMERICA,

Appellant,

v.

JAMES C. PETRILLO

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

BRIEF FOR JAMES C. PETRILLO

JOSEPH A. PADWAY,
HENRY KAISER,
HERBERT S. THATCHER,
736 Bowen Building,
Washington 5, D. C.
HENRY A. FRIEDMAN,
521 Fifth Avenue,
New York, New York.
DAVID KATZ,
175 West Washington Street,
Chicago, Illinois,

Counsel for Appellee.

INDEX

Subject Index

	Page
Brief for James C. Petrillo	1
The opinion of the court below	1
Statement as to jurisdiction	1
Summary of argument	1
Opening statement	5
Argument	
Analysis of statute	12
A. The statute outlaws the simple strike, the peaceful picket, and all other "means" to achieve objectives which the statute itself expressly legitimates	12
B. Congressional debates	15
C. Errors in appellants's approach to the statute and to the issues in this case	24
1. The statute does not deal with monopolies in the radio broadcasting industry	24
2. The statute does not outlaw objectives	28
The statute abridges freedom of speech in violation of the First Amendment	36
A. Peaceful picketing that threatens economic injury is within the protection of the First Amendment	36
B. The statute's proscription of speech does not meet the clear and present danger test	44
The statute is contrary to the Thirteenth Amendment	48
The statute is repugnant to the due process clause of the Fifth Amendment	52
A. The phrase "Number of Employees Needed by Such Licensee" is vague, indefinite and uncertain	52

Page

B. Equal protection of the laws ... 61
C. The statute destroys the right to bargain collectively, which is a "Liberty" within the meaning of the Fifth Amendment ... 66
Conclusion ... 70

Appendix A ... 73
Appendix B ... 80
Appendix C—Why foreign broadcasts must be regulated ... 84
Appendix D ... 87

TABLE OF CASES CITED

American Federation of Labor v. *Reilly*, 7 Labor Cases, 65 ... 69
American Federation of Labor v. *Swing*, 312 U. S. 321 ... 3
American Foundries v. *Tri-City Council*, 257 U. S. 184, 205, 207 ... 32
Bailey v. *Alabama*, 219 U. S. 219 ... 50
Bakery & Pastry Drivers v. *Wohl*, 315 U. S. 760 ... 3, 31
Big Lake Oil Co. v. *National Labor Relations Board*, 146 Fed. (2d) 967 ... 43
Bridges v. *California*, 314 U. S. 252 ... 3
Cafeteria Employees' Union v. *Angelos*, 320 U. S. 293 ... 3
Carlson v. *California*, 310 U. S. 106 ... 34
Cantwell v. *Connecticut*, 310 U. S. 296 ... 3
Cline v. *Frink Dairy Co.*, 274 U. S. 445 ... 54
Collins v. *Kentucky*, 234 U. S. 634 ... 54
Coppage v. *Kansas*, 236 U. S. 1, 27 ... 66
Dorchy v. *Kansas*, 272 U. S. 306 ... 30
Edward G. Budd Manufacturing Co. v. *National Labor Relations Board*, 142 Fed. (2d) 922 ... 43
Franklin Union v. *People*, 220 Ill. 355, 77 N. E. 176 ... 32
Glass Co. v. *Glass Blowers*, 77 N. J. Eq. 219, 79 Atl. 262 ... 32
Gompers v. *United States*, 233 U. S. 604, 610 ... 66
Gorin v. *United States*, 312 U. S. 19 ... 60
Henderson v. *Coleman*, 7 Sou. (2) 117 (Fla.) ... 49

	Page
Herndon v. *Lowry*, 301 U. S. 242, 258	46
Hiroboyashi v. *United States*, 320 U. S. 81, 100	61
In re Langell, 178 Mich. 305, 144 N. W. 841	32
In re Porterfield, 28 A. C. 102 (Calif.)	19
International Harvester Company v. *Kentucky*, 234 U. S. 216, 221	54
Kolley v. *Robinson*, 187 Fed. 415	32
Lanzetta v. *New Jersey*, 306 U. S. 451	53
May Department Store Co. v. *National Labor Relations Board*, 326 U. S. 376	41
Metropolitan Casualty Insurance Co. v. *Brownell*, 294 U. S. 580, 584	61
Midland Steel Products Co. v. *National Labor Relations Board*, 113 Fed. (2d) 800, 804	43
Milk Wagon Drivers Union v. *Meadowmoor Dairies*, 312 U. S. 287, 293	33
National Labor Relations Board v. *Virginia Electric & Power Company*, 314 U. S. 469	41
National Labor Relations Board v. *Ford Motor Co.*, 114 Fed. (2) 905, 913; certiorari denied, 312 U. S. 689	42
National Labor Relations Board v. *American Tube Bending Co.*, 134 Fed. (2d) 993; certiorari denied, 320 U. S. 768	43
National Labor Relations Board v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1, 33	66
Overnight Motor Transportation Company 316 U. S. 572	11
Opera on Tour v. *Weber*, 285 N. Y. 348	31
O'Neil v. *Behanna*, 182 Pa. 236, 37 Atl. 843	32
Otis Steel Co. v. *Molders*, 110 Fed. 698	32
Peter J. Schweitzer, Inc. v. *National Labor Relations Board*, 144 Fed. (2d) 520	43
Pierce v. *Stablemen's Union*, 156 Ca. 70, 103 Pac. 224	32
Pollock v. *Williams*, 322 U. S. 4, 18	49
Senn v. *Tile Layers' Protective Union*, 222 Wis. 383, 268 N. W. 270	37
Schneider v. *State*, 308 U. S. 147, 161	44
Schenk v. *United States*, 249 U. S. 47, 52	46

Page

Screws v. *United States*, 325 U. S. 91 4
Stapleton v. *Mitchell*, 60 F. Supp. 61 48
St. Germain v. *Bakery Workers*, 97 Wash. 282, 166 Pac. 665 32
Texas & New Orleans R. Co. v. *Brotherhood of Railway Clerks*, 281 U. S. 548 50
Thornhill v. *Alabama*, 310 U. S. 88 3
United States v. *American Federation of Musicians*, 47 F. Supp. 304, affirmed, 318 U. S. 741 11
United States v. *Carrozzo*, 37 F. Supp. 191; affirmed, 313 U. S. 539 11
United States v. *Cohen Grocery*, 255 U. S. 81 53
United States v. *Local 807*, 315 U. S. 521, 532 57
United States v. *Ragen*, 314 U. S. 513 59
United States v. *United Mine Workers of America*, Nos. 759-760, decided March 6, 1947 51
Vegelahn v. *Guntner*, 167 Mass. 92 31
Vonnegut Machinery Co. v. *Toledo Machine & Tool Co.*, 263 Fed. 192 32
Weeds v. *United States*, 255 U. S. 109 54
West Virginia v. *Barnette*, 319 U. S. 624 45

STATUTES CITED

Criminal Appeals Act, as amended May 9, 1942, 56 Stat. 271, 18 U. S. C. Sec. 682 1
Thirteenth Amendment 3
Section 506(a)(1) 3
House Report 1508, 79th Cong., 2nd Sess., p. 6 5
Report No. 1508, supra, p. 5 7
"Proceedings of the 62nd Annual Convention of the American Federation of Labor", pp. 402-404 7
Amusement Industry, Monthly Labor Review, August, 1931, pp. 261-267 8
Final Report of the Industrial Commission, House Document No. 380, 57th Cong., 1st Sess., pp. 822, 824, 825 9
Public Papers and Addresses of Franklin D. Roosevelt, Vol. II, pp. 202, 204 10
Hearings on Senate 158 and H. R. 4557, 73rd Cong., 1st Sess., April 25, 1933, p. 1 10

	Page
82 Congressional Record, p. 1696	11
House Report No. 1452, 75th Cong., 1st Sess., pp. 7 and 9	11
The Internal Affairs of Associations, 43 Harvard Law Rev. 993, 1014, et seq.	26
Truman Committee, 3rd Annual Report, 78th Congress, 2d Session, Report 10, Part 16, March 4, 1944, p. 25	29
Baruch Report on West Coast Air Craft Manpower Problems August 19, 1943, *New York Times*, September 17, 1943; *New York Times*, January 12, 1943, p. 14	29
Labor in The Courts, 39 Yale Law Journal, 682, 697	31
Landis & Manoff, Cases on Labor Law, Chapter, I, Second ed.	31
Frankfurter & Green, *The Labor Injunction*, p. 31	37
Section 2 of the Norris-LaGuardia Act, 29 U. S. C. A., Chap. 6	70
Section 1 of the National Labor Relations Act (49 Stat. 449)	70

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 954

UNITED STATES OF AMERICA,

Appellant,

v.

JAMES C. PETRILLO

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

BRIEF FOR JAMES C. PETRILLO

THE OPINION OF THE COURT BELOW

The opinion of the District Court (R. 3) is reported in 68 F. Supp. 845.

STATEMENT AS TO JURISDICTION

This Court has jurisdiction under the Criminal Appeals Act, as amended May 9, 1942, 56 Stat. 271, 18 U. S. C. Sec. 682.

SUMMARY OF ARGUMENT

I

The statute outlaws the simple strike and peaceful picketing as well as all other "means"—no matter what their constitutional stature and protection—which may be used

to effect certain conditions which Congress, in the same statute, recognizes as legitimate. Subsection (c) expressly renders valid agreements embodying the conditions set forth in subsections (a) and (b), and nothing in the statute prevents a licensee from unilaterally imposing those conditions. Prohibited only are all means, including those peacefully and traditionally used by workers, to obtain those lawful agreements. Such a statute is patently unjust and unconstitutional.

The Congressional debates reflect the insupportability of the statute. Some proponents of the bill completely avoided any frank discussion of its provisions but sought, instead, unfairly and irrelevantly to denigrate the character of the President of the American Federation of Musicians. Others were compelled by the illogic of their position to obvious evasion and self-contradiction. The debates show clearly that the lawmakers themselves could not interpret the statute so as to avoid repugnance to the Constitution.

Appellant argues at great length to show that Congress has power to outlaw labor monopolies. But the provisions of the statute, from its title to its conclusion, have nothing whatever to do with monopolies. Actually, the statute would apply to a single, non-union, unemployed person who pickets a licensee who refuses to employ him on the ground that he was not "needed." The alien issue of monopolies is introduced as a springboard from which to launch lengthy attacks upon the practices of the defendant and of the American Federation of Musicians—attacks which are wholly unwarranted by the facts and which, in any event, are irrelevant to the issues in this case. The claim that Congress sought to protect commerce from certain restraints of trade, although Congress expressly authorized binding agreements embodying those alleged restraints, is, we submit, absurd.

Appellant also argues that the statute must be narrowly applied to the facts alleged in the information. This argu-

ment concedes by necessary implication that the statute is not narrowly drawn and that its terms proscribe the exercise of civil liberties by persons other than defendant. The rule consistently followed by this Court is that a statute abridging freedom of speech must be tested on its face. See, for example, *Thornhill* v. *Alabama*, 310 U. S. 88; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Bridges* v. *California*, 314 U. S. 252.

II

The First Amendment protects the right to publicize the facts of a labor dispute with a private employer by a peaceful picket that threatens economic injury. *Thornhill* v. *Alabama, supra; American Federation of Labor* v. *Swing*, 312 U. S. 321; *Cafeteria Employees' Union* v. *Angelos*, 320 U. S. 293; *Bakery & Pastry Drivers* v. *Wohl*, 315 U. S. 760. Here, there is no "clear and present danger" of any conceivable "evil" since the objective of the picketing has been affirmatively approved by Congress.

III

The right to refuse to work for the private gain of another enjoys the same constitutional protection as does all basic civil liberties. Since the instant statute abridges that right in the absence of imminent danger of any evil it must fall. This is the first enactment by any legislature, since the adoption of the Thirteenth Amendment, which compels a single individual to work for a private person against his will. A statute which criminally punishes peaceful individual or concerted refusal to work for the private profit of others directly violates the Thirteenth Amendment.

IV

A. Section 506(a) (1) is repugnant to the due process clause of the Fifth Amendment because it defines a new crime in such uncertain terms that persons of ordinary

intelligence cannot know in advance whether their conduct is within the prohibition of the statute. The phrase "number of employees needed by such licensee" is of vague, indefinite and uncertain meaning. The criteria which determine the number employed for any given job (such as the financial resources of the employer, the complexity of the task, the desire and quality of the product, the skill of those who manage and those who labor, and a host of others) are so manifestly abstract and varied as to render impossible their condensation into any standard of conduct sufficiently clear and instructive to meet the rule against vagueness. Nor can the requirement of willfulness save an otherwise indefinite statute. *Screws* v. *United States*, 325 U. S. 91.

B. Due process precludes arbitrary classification. To permit licensees to impose conditions which are claimed to be evil, and at the same time to prohibit employees from merely seeking to establish the same conditions, is discriminatory and indefensible. The evil lies in what is done and not in who has done it. There is further discrimination as between employees in the radio broadcasting industry and employees in all other industries. The latter fully enjoy and exercise the right, by peaceful methods, to pursue the objectives which radio broadcasting employees may not. To single out for criminal punishment one segment of one industry for practices common to all segments of that industry and to all segments of all industries is to violate due process.

C. The statute destroys the right to bargain collectively which is a "liberty" within the meaning of the Fifth Amendment. The only bargaining power possessed by employees is that of refusing their collective labor, and this the statute prohibits. Legislative and judicial authorities recognize that only by collective action can employees enjoy liberty of contract. Collective bargaining, if it is to mean anything, must include the right to collective with-

drawal from work. By removing that right the statute destroys what has been held to be a "fundamental" right and, therefore, violates the Fifth Amendment.

OPENING STATEMENT

The provisions of Section 506, title V of the Communications Act of 1934, as amended (hereinafter referred to as "the statute"), its legislative history and even its popular designation ("Anti-Petrillo law") show its emotional and irrational content. The statute does not lay down anything like a consistent or comprehensible national policy on labor relations in the radio broadcasting industry. It is, rather, an expression of unrestrained vindictiveness, as witness the vituperative attacks with which the Report[1] and debates abound. Congressional discussion even sank to the low level of making derisive sport of appellee's proper name.

This unreasoned, bitter assault upon a labor organization of some 200,000 citizens can be explained only as the expression of an enraged prejudice that has been carefully nurtured and spread by the owners of the broadcasting industry whose inordinate profits were threatened with some reduction by the normal demands and activities of those whose training, skill and energy substantially contributed to the success of that industry.

These owners, banded together in a powerful national association, with virtually unlimited funds and with direct control over and access to the nation's radios and newspapers, the major avenues of public communication, were firmly resolved to smash the Musicians' Union for the simple reason that it, like any other union worthy of the name, was vigorously attempting to preserve and extend the economic welfare of its members.

The method they adopted was an elaborate propaganda campaign of abuse and vilification designed to inflame the

[1] House Report 1508, 79th Cong., 2nd Sess., p. 6.

people and the Congress of the United States and thereby enlist the sovereign power of our national government in support of their efforts to perpetuate their dominant economic position. The law approved on April 16, 1946, eloquently attests to the complete success of their well-laid plans and energetic efforts.

Let one of their own members describe their plans and tactics. On October 19, 1942, Mr. Samuel Rosenbaum, the President of Station WFIL, publicly issued a statement[2] he had made to a district meeting of the National Association of Broadcasters, in which he said:

> "We have engaged counsel to master-mind the campaign and we have hired a high-pressure publicity firm which is inspiring the national flood of news stories, editorials and cartoons against Petrillo.
>
> . . . . . .
>
> "We are allowing our name to be seriously damaged by letting it be used in a form of labor-baiting and labor-leader smearing which is a relic of a past generation . . . Billingsgate, bilge and bluff are no longer successful weapons in a labor negotiation.
>
> "With the entire press of the United States at our disposal, and with powerful branches of Government lending themselves amiably to the effort, all we have been able to think of is to attack the integrity and personal characteristics of one labor leader who happens to be a vigorous and outspoken agent of his craft.
>
> . . . . . .
>
> "There are deep-lying economic difficulties to be met in this controversy. What have we contributed toward their solution . . .? Not one constructive thought has been uttered. All our energy has been concentrated to organize a legal and newspaper hue-and-cry. The only remedy we have proposed is the old reactionary slogan, 'Keep everything as is.'"

---

[2] Republished in the October 26, 1942 issue of the trade magazine *Broadcasting*, p. 60.

Far from doing a "disservice"[3] to other labor unions,[4] far from acting "outrageously"[5] or arbitrarily, the American Federation of Musicians has been in the forefront of a social and economic contest whose outcome is vital to trade unionism. The "weapons" it has employed have always and ever been the completely peaceful ones of refusal to work, non-violent picketing, and verbal appeals to its fellow unionists and to its other friends.

The specific union activities which the statute proscribes are all addressed to the same end, namely, the enhancement of professional musicians' employment opportunities. Thus, the first four subsections of Section 506 (a) deal with direct attempts to increase employment. Subsections (5) and (6) deal with the effort to preserve jobs against the less expensive competition of amateurs and foreigners respectively. Section 506 (b) deals with the attempt on the part of employees to resist the destructive competition of mechanical devices which they, themselves, make.

A fundamental reason for the formation of labor organizations is the need and the desire on the part of workers, helpless as individuals, to obtain employment and to protect employment already obtained. Without employed membership the Musicians' Union, or any other union, would, of course, cease to exist. Collective bargaining, which is the declared policy of our Government, necessarily presupposes employment.

The American Federation of Musicians is, because of the circumstances in the industries in which its members work, peculiarly sensitive to abiding threats of unemployment. More than any other craftsmen in our economy are

---

[3] Report No. 1508, *supra*, p. 5.

[4] The complete support given the Musicians by the American Federation of Labor is evidenced by the action taken at its 1942 Convention, which is set forth in Appendix D, "Proceedings of the 62nd Annual Convention of the American Federation of Labor", pp. 402-404.

[5] Report No. 1508, *supra*, p. 6.

they subject to loss of jobs as a result of competition by machine and by less expensive labor.

A striking illustration of the dangers to which professional musicians are exposed was the advent of the sound motion picture. In 1928 and 1929—the first two years of the rapid growth of sound pictures—approximately 10,000 theatre musicians lost their jobs.[6] This dreadful condition was aggravated by the closing of many theatrical houses and legitimate theatres throughout the country. As a result, instead of 22,000 musicians employed in theatres in 1927 there are only some 4,000 so employed today. It is instances such as these and the daily threat of their recurrence (and not, as some would have us believe, the dictation of a self-willed labor leader) that have compelled the professional musicians of this country to join together and take measures in self-defense.

Can anyone, living in a society in which near full employment is obtained only in times of war, and in which from three to ten million workers are chronically unemployed, reasonably say that the attempts of employees to join together for the mutual protection of their jobs involve "moral turpitude"?[7] On the contrary, "may not all with a common interest join in refusing to expend their labor on articles whose very production constitutes an attack upon their standard of living and the institution which they are convinced supports them?" (Mr. Justice Brandeis in *Duplex* v. *Deering*, 254 U. S. 443, 481.)

The statute would stultify the obvious realities of contemporary industrial life, realities that have shaped the underlying labor policies of the Federal Government for many years.

---

[6] Effects of Technological Changes Upon Employment in the Amusement Industry, Monthly Labor Review, August, 1931, pp. 261-267. See also, Effects of Technological Changes Upon Employment in The Motion Picture Theaters in Washington, D. C., Monthly Labor Review, November, 1931, pp. 1005-1008.

[7] House Report No. 1508, *supra*, p. 4.

Some forty years ago a Congressional Committee, investigating the problem of machine displacement of labor, reported:

> ". . . *the only way in which the workmen* in a particular trade can, by their own action, *avoid the immediate hardship that results from improvements of machinery* and methods in their own craft *seems to be by united action taken through some such organization as a trade union.* It is believed to be impossible to point out any instance in which unorganized workmen have received any immediate and visible benefit from the introduction of new machinery in their trade." (Italics supplied.)[8]

The underlying policy of the labor and social legislation of the last fifteen years was to create employment opportunities and to adopt other means that would minimize unemployment. Several efforts were made during the Hoover administration to meet the problem of unemployment, such as the President's Emergency Committee for Employment, the Employment Stabilization Act of 1931, the Emergency Relief Construction Act of 1932, and the attempted passage of the 30-hour bill in December of 1932. These efforts, however, failed to stem the rise of unemployment.

We shall not attempt here to go into the detailed history of the extensive legislation of the Roosevelt administration[9] to provide for increased employment opportunities.

---

[8] Final Report of the Industrial Commission, House Document No. 380, 57th Cong., 1st Sess., pp. 822, 824, 825.

[9] The present administration has adopted the same policy. In his message to the Nation on November 3, 1946, describing the administration's post-war legislative program, President Truman said: "Unless we can soon meet the need of obtaining full . . . employment at home we shall face serious consequences." "Our primary aim is to bring about steady, well-paid jobs and purchasing power." "One essential part of our program, designed not only to tide us over the reconversion period but also to carry us to our goal of full production and a higher standard of living, is the adoption of full employment legislation." (Chicago Sun, January 4, 1946, p. 7.)

A few illustrations will suffice. In one of his first messages to Congress, President Roosevelt recommended the passage of legislation to provide "for the machinery necessary for a great cooperative movement throughout all industries to obtain wide re-employment . . ."[10] It was his purpose, he said, "to increase and to 'spread' work."[11]

The 30-hour week bill which was re-introduced in the 73rd Congress had for its basic purpose, according to the statement of the Secretary of Labor at the opening of the hearings, to "increase work and to increase the number of people who are earning money."[12]

The National Industrial Recovery Act was given precedence over the 30-hour week bill and was approved by the President on July 16, 1933. The NIRA declared it to be the public policy to reduce and relieve unemployment. President Roosevelt when signing the bill stated that the act was passed "to put men to work."[13]

The President's re-employment agreement of July 27, 1933, sought to give substance to Section 4 (a) of the Recovery Act which had as its purpose "the reemployment program in order to get as many unemployed back to work as quickly as possible." A report on the operations of the NIRA, which was submitted by the President to Congress on March 2, 1937, stated that the number one economic policy was the spreading of work.[14]

That the desire to create and spread employment was a basic purpose of the Fair Labor Standards Act is clearly indicated by the Chairman of the House Committee on Labor who stated "that is the purpose of the bill—to try

---

[10] Message to Congress dated May 17, 1933, *Public Papers and Addresses of Franklin D. Roosevelt*, Vol. II, pp. 202, 204.

[11] Id. at pp. 204-205.

[12] Hearings on Senate 158 and H. R. 4557, 73rd Cong., 1st Sess., April 25, 1933, p. 1.

[13] *Public Papers, supra*, pp. 22, 251-256.

[14] House Document No. 158, 75th Cong., 1st Sess. Report on the Operation of the NIRA.

to spread employment."[15] The debates in the House, as well as the House Report, show the fundamental intent of the bill to enlarge job possibilities.[16] See *Overnight Motor Transportation Company*, 316 U. S. 572. See also *United States* v. *American Federation of Musicians*, 47 F. Supp. 304, affirmed, 318 U. S. 741, and *United States* v. *Carrozzo*, 37 F. Supp. 191, affirmed, 313 U. S. 539.

Thus, we see that there is no validity whatever in the assertions on the part of the supporters of the Lea Bill that defendant or any group of employees in the radio broadcasting industry had been engaging in evil practices. All they have done is to engage in controversies that are as old and familiar as the employer-employee relationship itself. These controversies are all aspects of the basic issue that exists the world over—the desire and effort on the part of owners and employers to obtain and maintain the widest possible margin of profit and the conflicting desire of employees to obtain and maintain the widest possible margin of security and gainful employment.

The contest in the radio broadcasting industry is particularly acute because the musician employees are peculiarly subject to displacement by the machines they make, because the industry is new (with little experience in the statesmanship of collective bargaining) and has made gigantic strides and profits in remarkably short time, and because added to the economic power of the industry is its strategic power to publicize and propagandize its own views and interests, a power greatly enhanced by the circumstance that many broadcasting stations are owned and controlled by newspapers. Making full and effective use of its extraordinary powers, the radio broadcasting industry has succeeded in unfairly weighting the issue in its favor by receiving the aid of our Government in the form

[15] 89 Congressional Record, p. 1696.

[16] House Report No. 1452, 75th Cong., 1st Sess., pp. 7 and 9.

of the Lea Act. We assert that the aid thus given is repugnant to the Constitution of the United States.

ARGUMENT

I

ANALYSIS OF STATUTE

A. The Statute Outlaws The Simple Strike, The Peaceful Picket, and All Other "Means" to Achieve Objectives Which The Statute Itself Expressly Legitimates.

Most of the constitutional deficiencies of the statute grow out of the crucial fact that it prohibits all "means," no matter what their constitutional stature or protection, that may be employed to effectuate conditions that Congress, in the same statute, proclaimed lawful and permissible. It is, we submit, because of the patent unconstitutionality of such a statute that strenuous efforts have been made throughout the legislative and judicial consideration of this statute to obscure that crucial fact by the convenient but misleading device of resorting to conclusionary and descriptive language that totally repudiates the plain meaning of the actual provisions of the statute.

Thus, we are told that the statute "will place no limitation whatever on the use of strikes for the accomplishment of legitimate objectives," that it will only prohibit the accomplishment of "wrongful objectives."[17] But when we examine the statute itself we readily see how extravagantly erroneous those statements are.

Every one of the seven objectives set forth in subsections (a) and (b) of Section 506 are pronounced valid and permissible by subsection (c). Those seven objectives are:

1. The employment by a licensee of more persons than needed to perform actual service;
2. The making of payments in lieu of such employment;

[17] Report No. 1508, *supra*, p. 6.

3. The payment more than once for services rendered;

4. The payment of compenstaion for serviges not performed;

5. The refraining from broadcasting non-commercial educational or cultural programs;

6. The refraining from broadcasting foreign programs;

7. The payment of any "exaction" for the production and distribution of transcriptions and the levying of additional "exactions" for the commercial use of recordings for which payment has been made. (This last objective involves the principle embodied in some five hundred existing agreements between record manufacturers and users to pay a nominal royalty per record to an "employment fund" to create work for musicians who are displaced by the use of mechanical devices which they themselves make.)

As to those objectives, subsection (c) provides:

> "The provisions of subsection (a) or (b) of this section shall not be held to make unlawful the enforcement or attempted enforcement, by means lawfully employed, of any contract right heretofore or hereafter existing or of any legal obligation heretofore or hereafter incurred or assumed."

Plainly, therefore, any licensee may sign an agreement with any employee or group of employees or their bargaining representative encompassing all of the conditions set forth above. Indeed, as we shall hereafter show, any licensee may unilaterally impose those conditions against the express request of its employees. Therein lies the inherent injustice of the statute.

Consider, for example, the question of foreign broadcasts. Any licensee may conclude that it is to his best economic interest to refrain from broadcasting programs originating outside of the United States. The licensee is under no obligation to ask anyone concerning his right to refuse to broadcast such foreign programs; his own decision and

action are final and end the matter. He has committed no crime, he has done no wrong, he has violated no statute. But he has, absolutely and most effectively, prevented the broadcast of foreign programs.

Clearly, then, Congress has not declared that the absence of foreign broadcasts, or that any of the other conditions set forth in subsections (a) and (b), are undesirable or unlawful. On the contrary, by subsection (c) Congress has affirmatively endorsed and protected those conditions. All Congress has done is to prohibit the exercise of fundamental constitutional rights as a means of attaining the very conditions it has preserved and encouraged by this statute.

It is well at this point to emphasize how crudely and even fantastically unfair the statute is in its actual design and operation. A union or other representative of the employees of the licensee may, under this statute, make a request for one of the conditions listed in subsections (a) and (b), and the licensee may grant the request and incorporate it into a binding, enforceable agreement. But the union or representative dare not go beyond a request. Should the licensee, no matter how arbitrarily, reject the request, then the hands of its employees are completely tied. The employees must abjectly accept the arbitrary decision and refrain from any efforts in furtherance of their request, for to proceed will constitute criminal conduct subject to fines and imprisonment.

What system of logic, law or morality can rationalize a statute that permits a licensee whimsically to discharge 75 employees whom he declares unnecessary, but would imprison the remaining 25 employees should they, by peaceful picket, resist and publicize their employer's action? What possible justification is there for any statute which brands criminal the mere attempts of workers to secure the very conditions that the employer may directly impose with complete impunity? If, as the sponsors of this statute contend, the conditions listed in subsections (a) and (b) constitute evils, then why, in simple decency, did they not

outlaw those conditions? Can anyone seriously argue that the commerce of radio broadcasting or the welfare of the public is more seriously jeopardized where musicians object to the cheaper competition of foreign programs [18] than where licensees, for capricious reasons, cut out foreign broadcasts? If it is wrong to deny the public the pleasure of non-commercial educational and cultural programs, then why did not Congress make it unlawful for all persons, licensees as well as employees, to prevent the broadcast of such programs? If it be evil to pay a small sum of money per record into an "employment fund," then why did not Congress outlaw those funds and prohibit any person from creating them?

The flagrantly one-sided approach of the statute is, we submit, explicable only in terms of a deliberate intention on the part of its sponsors to enlarge the prerogatives of the licensees and thereby enhance their profits. It was fully realized that flatly to outlaw the conditions or objectives set forth in subsections (a) and (b) would greatly prejudice the economic interests of licensees. The only way of achieving the dual aim of retaining and increasing the economic advantages of the employers and of diminishing and destroying the bargaining power of the workers was by legitimating the conditions listed in subsections (a) and (b) and outlawing only the means which employees have traditionally used in quest of any conditions.

B. *Congressional Debates*

There can be no more graphic illustration of the pervasive inequity of the statute than the quality and content of the Congressional debates. They are replete with extraordinary mental gymnastics performed by the managers and other proponents of the bill with obvious eva-

[18] See "Why Foreign Broadcasts Must Be Regulated," March, 1946, issue of the *International Musician*, set forth herein as Appendix C.

sions and crude contradictions which the basic illogic of their position forced upon them.

It may be fairly said of the debate in the House that, generally, those who supported the bill were far more determined unfairly to vent their spleen on Mr. Petrillo than to enact a consistent or constitutional law. The arguments and statements of the opponents of the measure, to which we fully subscribe, were not met on any rational basis for the simple reason that they could not be so met.

Congressman Marcantonio, in vigorous opposition to the bill, realistically pointed to the true aim and effect of the statute:[19]

> ". . . This bill is brought here behind a smoke screen of indignation against the activities of Mr. Petrillo . . . Just what does it do to organized labor in the broadcasting industry?
>
> "An analysis of this bill—a cold-blooded analysis of this bill demonstrates . . . it goes further than any other bill that the Congress has ever had before it with respect to the right to strike. This is the first time that we have before us a bill which calls for imprisonment in the event that American workers go out on strike . . . Under this bill, if the American musicians refuse to work because of the broadcasting company refusing to accede to their demands, they may be prosecuted and sent to jail. You cannot get away from that, and no amount of blanket denial will contradict it."
>
> . . . . . .
>
> ". . . They speak about the immorality of Petrillo's actions. I just wonder how moral it is to fix a labor policy in this industry which takes money out of the pockets of workers and puts it into the pockets of broadcasting companies. Read the bill. It is a bill to increase the profits of broadcasting monopolies at the expense of workers and not a bill to protect children's orchestras, as its proponents would have us believe."

---

[19] 92 Cong. Rec. 1545-6.

Thereafter, Congressman Marcantonio offered an amendment to strike out the language "or by the use or express or implied threat of the use of other means." This amendment was, of course, calculated to permit peaceful striking, picketing and similar means for lawful objectives. In support of that proposal he said (id. at p. 1559):

> ". . . You are legislating imprisonment for men refusing to work. It is clearly in violation of the thirteenth amendment; it is unconstitutional; but if Congress wants to do it, if instead of discussing the bill you prefer to keep up to the pattern that has been set here of raising smoke screens, of waving the flag, of talking about Union men that are buried and Confederate men that are buried, of condemning Caesar and defending the shrine, go ahead and lynch organized labor and enjoy it while you are doing the job."

Congressman Rabin emphasized the unconstitutionality of prohibiting a strike for ends that are admittedly lawful:

> "I agree with the gentleman from Indiana (Mr. Halleck), except I will go further: I do not have any doubt about this bill being unconstitutional. What does this bill do? Does it make certain practices a crime and does it provide that you may not strike to achieve those ends? It does not do that. It makes the very act of striking a crime, because if you will read with me on page 1, it provides:
>
> . . . . . .
>
> "'It shall be unlawful . . . by the use of other means—'
>
> "And that refers to strikes. It shall be unlawful by the use of a strike to do certain things. Without a strike it is lawful to do those things under the terms of this bill. The union may sit around the table now and agree to receive a fraction of a cent per recording. It will be able to do that should this bill be passed.
>
> "What then do you do by this bill? You say if it attempts to strike to accomplish that end, then it shall be unlawful . . . It makes the very act of striking a crime, and that is why I am opposed to this bill. What

else does this bill do? As I read it, it places in jeopardy the royalty of radio artists, because if a radio station broadcasts a program and that is transcribed, no royalty may be demanded under the threat of strike. But they could be paid if they sat around the table and worked out an arrangement for payment. If a broadcasting station refuses to pay them, and these radio artists get together and demand that it be done under the threat of a strike, then it becomes unlawful for them even to ask for royalties." [20]

Particularly significant was the amendment proffered by Mr. Rabin and the action taken thereon by the House. He suggested the addition of the following language: "Nothing herein contained shall prohibit the right to strike for any objective which may be lawfully obtained through negotiations."

This put the issue squarely before the House—the issue of whether or not men may strike or picket for lawful objectives. However, consistent with the intention and actual provisions of the statute, his proposal was brushed aside as "a crippling amendment" and voted down. The House was simply not prepared to pay any attention to the Constitution of the United States.

In the Senate there was, comparatively, a more palpable disposition to give due weight and consideration to the Constitution. However, to give the statute even a semblance of constitutionality its supporters in the Senate were inevitably constrained to stretch and distort the plain language of the statute and, finally, to contradict themselves on several occasions.

The initial thesis of the proponents of the bill was that "the law recognizes the right to strike for lawful purposes and in a lawful manner," [21] but that the statute only prohibited strikes and similar activities for "wrongful objectives." (Id., p. 6.) That was the dominant theme both

[20] Id., at 1554.

[21] Report No. 1508, *supra*, p. 4.

in the House Report and in the House debates. Near the opening of the Senate debate, however, there was a complete reversal of approach. The spokesmen for the bill conceded that the objectives were lawful, but sought to argue that only unlawful means were proscribed, thereby implying that every cessation of work and every peaceful picket, no matter what their occasion, circumstance or purpose, are unlawful.

Thus, Senator White, one of the managers of the bill, stated:

> "As I have said, the parties would be at complete liberty of action, and inhibited only by the general principle that it shall be unlawful by threats, intimidation, duress, and otherwise, to coerce any one. In other words, *the action shall be unlawful if unlawful means are employed.* Otherwise there is the most complete freedom of contractual arrangement between all the parties concerned . . ." (Italics supplied.)[22]

This approach on the part of Senator White and others at the outset of the debate in the Senate was no less fatuous than the original approach in the House. To describe a peaceful strike or picket as "coercive" with the hope of thereby imputing to the peaceful strike or picket something inherently evil is merely to engage in infantile semantics.

The same device is employed extensively throughout appellant's brief. What this argument comes down to is that anything that might in common parlance be described as "coercive" can be restrained. Such an argument consists merely of a convenient play on words. If in any sense all peaceful strikes and pickets are "coercive", then it may be categorically stated that many forms of "coercion" enjoy some constitutional protection. As stated in the case of *In Re Porterfield*, 28 A. C. 102 (Calif.):

> "It is too firmly established to merit much more than the mere enunciation of the fact that not all con-

[22] 93 Cong. Rec. 3243.

> duct embracing or effecting compulsion, coercion, intimidation, threats, and menace is unlawful. . . . Various means of economic suasion such as picketing . . . and refusal to work together . . . may be performed in the exercise of civil liberties, guaranteed by both our Federal and State Constitutions."

Moreover, the statute does not prohibit "coercion" alone. Under Section 506 (a) (1) persons may not use any means "to constrain" a licensee. The word "constrain" has been defined to include the words "urge" and "impel." Hence, under this statute even the elementary right to urge an employer to grant something which he may lawfully grant is declared criminal.

Senator Taylor advanced the obviously valid point that if a strike for a contract that was admittedly lawful is "coercive," then "practically every contract in America is invalid." He added:[23]

> "I have tried to find out what the language in the bill means. Nobody seems to know. It contains the words 'other means.' Nobody knows what those words mean, and no one has been able to tell me whether the threat of a strike is coercion."

Here Senator Austin, another manager of the bill, took up the cudgels and promptly reversed his colleague, Senator White. After giving assurances that the phrase "other means" included the right to strike, he explained that the only strikes that were outlawed were those addressed to illicit purposes. He said:

> "In the conference we discussed fully those words, and it was definitely understood that they included strikes and boycotts . . . They may not strike *to gain advantage of those misdemeanors which are set forth.* However, they may strike for anything that is not unlawful." (Italics supplied.)[24]

---

[23] 92 Cong. Rec. 3248.

[24] Ibid.

Senator Taylor would not be put aside by this change of position. He used a very apt illustration to demonstrate that the statute set forth no unlawful objectives which could be gained by any strike, saying:

> "The act for which he was put in jail would not in itself be unlawful. He would be in jail simply because he had used a certain method of attaining an end. On another radio station the employees might have an agreement, openly arrived at, and involving no strike, and they might be doing the very same things, and be scot free. But the other person would be put in jail because he had used certain means to accomplish the same end. It is not the act itself which is made unlawful. It is the method used to reach the end which is unlawful." [25]

Thereafter, Senator La Follette joined in the discussion and declared that, although "contracting is not prohibited," nevertheless employees of radio stations "would be prohibited from using their collective bargaining power or their right to strike if the broadcasting company refused" to grant a contract.[26]

In reply, Senator Tunnell, another manager of the bill once again altered the position of the bill's proponents by saying, "I do not see anything in the measure which would warrant that conclusion," and Senator Johnson, his fellow manager, concurred.[27]

In other words, at this stage of the debate the managers of the bill were asserting that the statute did not prevent the peaceful strike for the objectives set forth in subsections (a) and (b). This assertion, of course, bore no relation to the actual facts and was immediately challenged by Senator Ball, who said:

> "It seems to me that in subsections (a) and (b) we have made unlawful the use of the strike to compel an

[25] Id., p. 3251.

[26] Ibid.

[27] Ibid.

employer to sign a contract, even though it is the same contract which existed before. If that has not been done, then I do not see what use can be made of the entire section."[28]

Nevertheless, Senators Tunnell and Johnson temporarily held to the view, albeit without any attempt at explanation, that the right to strike was not prohibited by this statute—as witness the following colloquy:[29]

"Mr. Hatch: Is the Senator from Delaware convinced that the language of the bill does not preclude the right of collective bargaining and the right to strike?

"Mr. Tunnell: I am convinced that those rights are not precluded.

"Mr. Johnson, of Colorado: I am also convinced that they are not precluded."

At this juncture Senator Taylor took the floor again. He reminded the Senate that Senator Austin had previously expressly said that "Strikes are not permitted for any one of a number of different objectives, some of which are now included in the contracts between the radio entertainers' unions and the employers."[30] Thereupon, Senator Austin arose and, ignoring his own previous, explicit statement that the statute outlawed the right to strike for the named objectives, observed:

"I do not think I said . . . that a strike, which is the sanction behind collective bargaining, is barred by anything in this bill . . ."

. . . . . .

"I do not want my words to be interpreted to mean that these provisions bar the use of the strike as a sanction for collective bargaining."[31]

---

[28] Id., p. 3253.

[29] Ibid.

[30] Id., p. 3254.

[31] Ibid.

Subsequently, Senator O'Mahoney presented a hypothetical situation to Senator White which contained all the elements involved in this case. He asked:

> "Assume that in a broadcasting studio there are three artists who are performing night after night on a particular program and they have come to the conclusion that the strain upon their voices or the work which has been placed on their shoulders is too heavy, and they state to the broadcasting studio, 'There ought to be five persons carrying on this program.' Assume, further, that the broadcasting manager replies, 'No; three is enough.' Then those three persons say, 'Very well, we strike to make you employ five.' Would such an act come within the prohibition of the proposed legislation?[32]

Senator White—the same Senator White, it will be recalled, who at the outset of the debate took the position that all strikes were outlawed because they were "coercive"—replied:

> "I think the employees could strike if they wished to do so. If they walked out I think they would be doing something legal."[33]

We reach the climax of this confusing and futile debate when Senator O'Mahoney addressed the same question to Senator Austin. Only a few minutes before Senator Austin had protested against the suggestion that "I have represented that these provisions bar the use of the strike as a sanction for collective bargaining."

But now, in reply to Senator O'Mahoney's question, Senator Austin observed, "The record definitely shows that the words [other means] include boycotts and strikes."[34]

We say that the Congressional debates poignantly illustrate the irreconcilability of this statute with the Constitu-

---

[32] Id. 3257.

[33] Ibid.

[34] Ibid.

tion of the United States. Evasions, shifts of position, excessive and beclouding verbiage, cannot and do not alter the basic fact that this statute completely prohibits every strike and every picket and every other means which employees of licensees may utilize in an effort to obtain collective bargaining agreements which the same statute approves. Nothing can alter the fact that such a statute is outstandingly repugnant to the Constitution of the United States.

C. *Errors in Appellant's Approach to The Statute and to The Issues in This Case.*

1. *The statute does not deal with monopolies in the radio broadcasting industry.*

Like those who supported the Lea Bill in Congress, appellant has been confronted by the same insuperable task of assigning some semblance of reasonableness, consistency and constitutionality to a statute that is conspicuously devoid of them. Accordingly, they have been compelled to resort to the same unfortunate techniques employed by some of the supporting Congressmen.

There is an effort to portray defendant James C. Petrillo as a recklessly arbitrary union official with total and unrestrained power over a membership of some 200,000 persons. Appellant would make it appear that that huge membership has no alternative other than meekly to submit to defendant's dictates even though all officials of the American Federation of Musicians are freely and democratically elected at annual conventions of the union.

The foregoing effort is made possible by the device of introducing an entirely alien issue. Appellant reads the statute as though it prohibits and outlaws labor monopolies and then proceeds elaborately to argue the constitutional power of Congress to enact such a statute. Defendant has

at no stage of the proceedings in this case contested that power, and the Court below did not rule upon it because there was and is no occasion so to do.

If the statute actually outlawed labor monopolies in the broadcasting industry and if the question before this Court was whether Congress had reasonably exercised its commerce power in outlawing those monopolies, then it would have been entirely appropriate to show the evidence upon which Congress ostensibly acted. But the instant statute deals not at all with monopolies or restraints of trade. It criminally punishes "*whoever* willfully violates any provision of subsection (a) or (b)",[35] that is, any person—even a single unemployed worker who belongs to no union and who seeks by picket or any other means to compel an employer who has no need for additional employees to put him to work.[36]

If, indeed, there be any relevancy to the Government's multifarious references to the monopolistic practices of the American Federation of Musicians and its President, then, plainly, the information should have so charged, and the Government should have undertaken the burden of proving those charges in a court of law. Instead, it treats the passionately partisan and uncross-examined remarks of persons notoriously antagonistic to the defendant and to the American Federation of Musicians as though they were judicially found facts. A detailed refutation of the "facts" so heavily relied upon by appellant throughout its argument would run this brief into excessive length. An examination of a few of them will suffice to show their utter falsity and unreliability.

Treated as a "fact"—on which the Government subsequently builds constitutional arguments[37]—is the canard

[35] Subsection (d).

[36] On page 100 of its brief, where it argues a different phase of the case, appellant readily concedes that "the Act applies to anyone who intereferes with broadcasting in the ways specified."

[37] See, for example, pp. 44, 76, 78, 79 and 82 of appellant's brief.

that Mr. Petrillo has "the power to expel any member of any local without reason or without trial." (P. 22, appellant's brief.) Counsel for the Government must be familiar with the elementary rule of the law of unincorporated associations, which denies to any person or organization the right or power under any circumstances to remove a member without just cause and without full and fair trial.[38] We categorically assert that neither appellee nor any other officer or affiliate of the American Federation of Musicians has ever disciplined any member without cause and without trial.

Mr. Maddy, whose testimony before Congressional Committees is extensively relied upon by appellant, maintained for several years a continuous barrage of criticism against the policies adopted by a majority of his organization and executed by appellee without experiencing any retaliatory action by the union. It was only when he flagrantly violated a basic rule in the constitution of the American Federation of Musicians—a rule written by a majority of the union long before Mr. Petrillo assumed office—that disciplinary action was instituted against him. When this action was taken, Mr. Maddy was given ample notice of the written charges against him. At his trial he was represented by able counsel of his own choice and was given the fullest opportunity to challenge and cross-examine the testimony against him and to produce all the witnesses and evidence he deemed relevant. Finally—to put the conclusive touch on the conspicuous distinction between the fiction of Mr. Maddy's testimony before the Congressional Committee and the facts as they actually exist—defendant James C. Petrillo voluntarily abstained from any participation in the action taken by the Executive Board of the American Federation of Musicians against Mr. Maddy.[39]

---

[38] Chaffee, *The Internal Affairs of Associations*, 43 Harvard Law Rev. 993, 1014, et seq.

[39] Nor is the Board's decision final. He has the full right of appeal to the annual convention and following that, of course, to the courts.

Repeated, too, by appellant (p. 32 of brief) is the so-called "finding" of the House Committee that "the amount of money extorted from the broadcasting industry . . . without moral right" by the "racketeering" methods of the American Federation of Musicians is "probably much in excess of $20,000,000 a year." That astronomical figure can only be described as the product of glaring ignorance seasoned by a vindictive prejudice.[40]

But even if the testimony before the various Congressional Committees had any foundation of truth, it is not, we repeat, properly before this Court. That is so because the evidence adduced by appellant is directed only to the question of the power of Congress to outlaw monopolies, and the Lea Act does not raise that question.

---

[40] In footnote 17, p. 33 of its brief, appellant notes that "appellee has urged below that this estimate was excessive and in disregard of amounts ascertainable from the records of the Federal Communications Commission," and then points out that the Commission's records are limited to the wages of staff musicians only and do not include wages paid by commercial sponsors or by hotels, restaurants and the like to orchestras whose programs are broadcast or wages paid by recording companies who employ the musicians to make the records used for broadcasting. Appellant then presents the *estimate* of the War Labor Board that in *various* forms "radio paid musicians $30,000,000."

This attempt on the part of appellant to justify the extravagant $20,000,000 figure advanced by the Committee Report is most illuminating. Our challenge of the figure is not, of course, addressed to the question of wages. Surely, there is nothing immoral or extortionate about earning a high wage. And considering the admittedly huge contribution of music to the tremendous profits of the broadcasting industry, it would hardly be excessively generous if the industry were to pay substantially more than the $30,000,000 "estimated" by the War Labor Board. The fact is that the total revenue obtained by musicians in the form of wages paid by licensees, sponsors, recording companies, hotels and restaurants, plus all contributions to lawful welfare funds, is approximately $25,000,000. However that may be, what we challenged below and what we challenge here is the misstatement contained in the report and repeated by the Government. The figure of $20,000,000 quoted by the Government refers not to wages but to alleged immoral extortion, and that, we say, is elaborately and prejudicially untrue.

2. *The statute does not outlaw objectives.*

We agree with appellant that "it is proper for the legislative body, even more than for the courts, to decide what purposes should be considered unlawful" (p. 67, brief). We insist, however, that Congress decided that the purposes set forth in subsections (a) and (b) are lawful. We insist that it is absolutely impossible for appellant to support its assertion that "clearly the statute does . . . prohibit . . . only strikes to accomplish particular purposes which Congress thought contrary to the public well-being and *declared unlawful.*" (Italics supplied; p. 62, brief.)

Where? In what section of the statute did Congress make that declaration? Appellant points to none because there is none. Incredulously enough, the only section pointed to by the appellant is 506 (c), the one which, as appellant concedes, expressly authorizes the making and enforcement of agreements embodying those very purposes. Appellant in effect argues that that section does not mean what it plainly and admittedly says; or, put otherwise, that Congress has "declared unlawful" the objectives set forth in subsections (a) and (b) by the novel device of declaring them lawful in subsection (c). And Congress adopted this strange procedure because "licensees could be counted on not to agree" to what Congress said they may agree (p. 61, appellant's brief). Appellant's reasoning, we respectfully suggest, is something less than persuasive.

Congress passed subsection (c) because the sponsors of this bill, the owners of the radio broadcasting industry, were not prepared to impose upon themselves the same restraints they sought to impose upon their employees. They were careful to preserve their economic freedom by leaving unabridged their absolute right to do any of the things listed in subsections (a) and (b). It is common knowledge that the average licensee faced with a choice would reject a bid to broadcast a gratuitous, amateur

program in place of a profitable commercial program. So, too, with respect to the hiring of unnecessary employees. There have been many instances in our industrial history where employers have deliberately hired excessive employees. During the wartime, for example, when labor was in short supply many employers hoarded workers.[41] And in some industries it has been a regular practice to maintain an excess of workers in order to keep wages low. It is a matter of common knowledge that from the year 1300 down to the present day there have been countless disputes between employers and employees over the question of the number of apprentices to be employed, the employees seeking a restricted, limited number, and the employers seeking large numbers.

What Congress enacted in subsection (c), and not what some supporting Congressmen may have said they were enacting, is obviously determinative. The complete contradiction between the provisions of the statute and the statements of Congressmen quoted and relied upon by appellant is, we believe, self-evident.

Thus, Representative Lea's statement that Congress is not "powerless to prescribe a rule that prevents a strike being carried on for the purpose of committing a crime" (p. 64, appellant's brief) is completely true and completely irrelevant. The purpose of the strike in the instant case was to obtain the employment of three additional workers, and that is nowhere made "a crime," nowhere made a felony similar to "murder" (Senator Johnson's analogy quoted on page 64 of appellant's brief), or a "misde-

---

[41] Truman Committee; 3rd Annual Report, 78th Congress, 2d Session, Report 10, Part 16, March 4, 1944, p. 25: ". . . it was a common practice for manufacturers to hire more workers than they could use. . . ." Baruch Report on West Coast Air Craft Manpower Problems August 19, 1943, *New York Times*, September 17, 1943; *New York Times*, January 12, 1943, p. 14, "There has been more labor hoarding than I like," Mr. McNutt declared at his press conference. "It's a very human trait."; *New York Times*, March 11, 1944, "Truman Committee Scores Hoarding."; "*Enemy Hours*," pamphlet published by the Brotherhood of Railroad Trainmen, March 15, 1945.

meanor" (Senator Austin's analogy quoted on page 66 of appellant's brief). If it were, we should be forced to say that subsection (c) legalizes the making and enforcement of an agreement to commit a crime.

Our essential thesis throughout is that the right to strike or picket for a purpose declared lawful is protected by the Constitution and denied by the Lea Act. The common law cases cited by appellant deal with the restraint of strikes for unlawful purposes and hence are irrelevant. Appellant cites no case wherein the Federal Congress or a state legislature had declared a purpose lawful but proscribed the use of any means in furtherance of that purpose.

Appellant urges, however, that the common law cases support the proposition that the purposes of strikes or pickets may be held unlawful even though the employer may lawfully grant the employee demands of his own accord. But in none of those cases did the parties raise or the courts consider the precise issues here involved. In *Dorchy* v. *Kansas*, 272 U. S. 306, for example, no one raised the issue as to whether or not the payment of a stale claim of an employee who had long since left the employment of the company was a lawful purpose for which men may strike. The Court proceeded on the assertion, which no one questioned or challenged, that it was an unlawful purpose and applied the common law rule that a strike for an unlawful purpose may be restrained since the right to strike was not absolute. Had that case involved a statute expressly authorizing the making and enforcement (by strike) of agreements to pay stale claims and had the defendant raised the issue of the legality of the strike's objective, then—and only then—would the *Dorchy* decision be applicable. As stated by the Supreme Court of Alabama in *Alabama State Federation of Labor* v. *McAdory*, 246 Ala. 1:

> "True, in *Dorchy* v. *Kansas*, 272 U. S. 306, is the statement: 'Neither the common law, nor the Four-

teenth Amendment, confers the absolute right to strike.' . . . We cannot read that case, however, to the end that the State may constitutionally forbid a lawful strike called for a lawful purpose . . ."

The Massachusetts' cases come somewhat closer to the instant case because they are the only ones where the courts have held that an agreement embodying an objective is lawful and enforceable but a strike for that objective is unlawful. The obvious inconsistency of those decisions has been the subject of extensive criticism,[42] and the fact that the criticism of those cases never "suggested that they were in violation of the Federal Constitution" (n. 24, p. 61, appellant's brief) means only that those cases were decided before *Thornhill's* case (*Thornhill* v. *Alabama, supra*) and does not mean that they are not in conflict with the Constitution. Constitutional issues were not raised[43] in labor cases before *Thornhill's* case, and the explanation is a simple, historical one. Labor's status before the law was for many years exceedingly low. Mr. Justice Holmes, for example, could "remember when many people thought that, apart from violence or breach of contract, strikes were wicked as organized refusals to work." (*Vegelahn* v. *Guntner*, 167 Mass. 92.) Mere combinations of workingmen, striving for elementary rights, were treated as something unutterably evil and were universally condemned by the courts[44] who, for the most part, shared the prevailing hostile *animus* against labor and substituted their own preju-

---

[42] Sayre, *Labor in The Courts*, 39 Yale Law Journal, 682, 697:

". . . the law of Massachusetts as to the legality of strikes has been reduced to a state of chaos. Neither the Massachusetts courts nor any one else has been able to reconcile or adequately to explain such conflicting decisions . . ."

[43] "The respondents say that the basis of the decision below was revealed in a subsequent opinion . . . (*Opera on Tour* v. *Weber*, 285 N. Y. 348) . . . But this . . . was uttered in a case where the question of the existence of a right to free speech under the Fourteenth Amendment was neither raised nor considered." (*Bakery & Pastry Drivers* v. *Wohl*, 315 U. S. 760, p. 774).

[44] Landis & Manoff, *Cases on Labor Law*. Chapter I. Second ed.

dices for reliable and consistent rules of law (see Mr. Justice Brandeis in *Duplex Printing Co.* v. *Deering, supra*). Instead of anything resembling rule or principle or logic or reason, decisions on the legality of union action were rendered on the basis of the particular prejudice of a particular court at a particular time.

About forty years ago, for example, a Federal judge said:

> "There is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity or peaceful mobbing or lawful lynching." (*Atchison, etc., Co.* v. *Gee*, 139 Fed. 582.) [45]

This conception was by no means unique. Indeed, it probably represented the prevailing law.[46]

Small wonder, therefore, that in a judicial atmosphere of that kind neither labor spokesmen nor their legal counsel thought of establishing the rights of labor on a constitutional basis. Their more immediate objective was to liberalize State and Federal statutes and judicial precedents so as to enlarge their elementary rights. It took years to penetrate through the accumulated mass of prejudice before picketing was recognized for what it quite simply and obviously is—a means of stating facts. This recognition was facilitated by the enactment of Federal legislation such as the Clayton Act of 1914, the Norris-LaGuardia Act of 1932, the National Labor Relations Act of 1935, and State legislation patterned upon them.

---

[45] See also *American Foundries* v. *Tri-City Council*, 257 U. S. 184, 205, 207, where the Court said that the word "picket" indicated "a militant purpose inconsistent with peaceable persuasion," and that the word "picketing" was a "sinister name," that "peaceful picketing was a contradiction in terms."

[46] *Pierce* v. *Stablemen's Union*, 156 Ca. 70, 103 Pac. 324; *Franklin Union* v. *People*, 220 Ill. 355, 77 N. E. 176; *Vegelahn* v. *Guntner, supra*; *In re Langell*, 178 Mich. 305, 144 N. W. 841; *Glass Co.* v. *Glass Blowers*, 77 N. J. Eq. 219, 79 Atl. 262; *O'Neil* v. *Behanna*, 182 Pa. 236, 37 Atl. 843; *St. Germain* v. *Bakery Workers*, 97 Wash. 282, 166 Pac. 665; *Otis Steel Co.* v. *Molders*, 110 Fed. 698; *Kolley* v. *Robinson*, 187 Fed. 415; *Vonnegut Machinery Co.* v. *Toledo Machine & Tool Co.*, 263 Fed. 192.

It was in the decision in a case dealing with the constitutionality of the Wisconsin Anti-Injunction Act, a prototype of the Federal Norris-LaGuardia Act, that appeared for the first time a statement that foreshadowed the *Thornhill* decision:

> "Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution." (*Senn* v. *Tile Layers' Protective Union,* 301 U. S. 468, 478.)

On the strength of that statement, a constitutional issue was, for the first time, presented to the Supreme Court of the United States in *Thornhill's* case. Thus, it is clear that in discussing or deciding any case, wherein the claim is made that union action is protected by the Federal Constitution, "the starting point is *Thornhill's* case." (*Milk Wagon Drivers Union* v. *Meadowmoor Dairies,* 312 U. S. 287, 293.)

Accordingly, there is no substance in any argument to the effect that some common law decisions have not been criticized as violating the Constitution. We respectfully submit that in so far as Massachusetts, or any other State, or any legislature, would prevent peaceful striking and picketing for an agreement which is expressly authorized by law, it would be acting contrary to the Constitution of the United States.

3. *The statute must be tested on its face*

Appellant insists that appellees cannot in this case argue the constitutionality of the right to picket and the right to strike because he, personally, did not engage in a strike or picket.

The argument assumes that the employees of Station WAAF had a constitutional right to strike and picket in the manner and for the reason they had. Nevertheless, according to this argument, the defendant, James C. Petrillo,

may be imprisoned for the "crime" of causing those employees to exercise their constitutional rights.

The decisions in *Thornhill* v. *Alabama, supra,* and *Carlson* v. *California,* 310 U. S. 106, are conclusive of this issue. The statutes involved in both of those cases expressly prohibited persons from influencing others to strike.[47] In rejecting the contention advanced in *Thornhill's* case that the statute "not be judged upon its face," the Court gave two reasons that are completely applicable here. The Court asserted that "the charges were framed in the words of the statute and so must be given a like construction." (p. 96.) And then the Court gave its "further reason for testing the section on its face:"[48] (p. 97.)

> "Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas. *Schneider* v. *State,* 308 U. S. 147, 162-165; *Hague* v. *C. I. O.,* 307 U. S. 496, 516; . . . It is not the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. See *Near* v. *Minnesota,* 283 U. S. 697, 713. One who might have had a license merely for the asking may therefore call into question the whole scheme of licensing when he is prosecuted for failure to procure it. *Lovell* v. *Griffin,* 303 U. S. 444; *Hague* v. *C. I. O.,* 307 U. S. 496. *A like threat is inherent in a penal statute, like that in question here, which does not air specifically at evils*

---

[47] The statute in *Thornhill's* case (p. 88) prohibited "loitering for the purpose or with the intent of influencing or *inducing other persons not to . . . be employed;*" and the evidence showed that Thornhill had successfully urged an employee to quit his job.

The ordinance in the *Carlson* case (p. 109) prohibited loitering "for the purpose of inducing or influencing . . . any person from entering any . . . place . . . of employment, . . . or for the purpose of inducing or influencing . . . any person to refrain from doing or performing any service or labor . . . , or for the purpose of . . . coercing . . . any person who is performing, seeking or obtaining service or labor . . ." (Italics supplied.)

[48] In the *Carlson* opinion the Court stated that upon the authority of the *Thornhill* decision "the ordinance in question is to be judged upon its face" (p. 111).

within the allowable area of State control, but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press . . . . An accused, after arrest and conviction under such a statute, does not have to sustain the burden of demonstrating that the State could not constitutionally have written a different and specific statute covering his activities as disclosed by the charge and the evidence introduced against him. *Schneider* v. *State*, 308 U. S. 147, 155, 162-163. Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that *it is the statute, and not the accusation or the evidence under it*, which prescribes the limits of permissible conduct and warns against transgression. *Stromberg* v. *California*, 283 U. S. 359, 368; *Schneider* v. *State*, 308 U. S. 147, 155, 162-163." (Italics supplied.)

Appellant misconceives the rule respecting statutes that restrict free speech. It strenuously urges that this Court consider only the question of whether or not the statute can be constitutionally applied to the facts charged in the information; that there is no issue before this Court in respect to the deprivation of the constitutional rights of others in different circumstances. As supporting authority it cites cases wherein the Court has narrowly applied the statute to the precise facts before it and refused to consider academic or hypothetical situations. We recognize and do not challenge the general rule of narrow application of statutes to the precise facts in a given case. But the rule covering statutes restricting freedom of speech is an avowed exception to the general rule. A "statute which is the source of restriction on free speech must be 'narrowly drawn to govern the precise situation giving rise to the danger.'" (Mr. Justice Douglas in *Wohl* case, p. 776.)

Obviously, a statute "narrowly drawn" is the very antithesis of a statute narrowly applied. Since appellant's major thesis concedes that the instant statute abridges the freedom of speech of some persons, the statute must fall and

cannot be applied to any persons. (*Cantwell* v. *Connecticut, supra* pp. 307, 311; *Bridges* v. *California, supra.*)

II

THE STATUTE ABRIDGES FREEDOM OF SPEECH IN VIOLATION OF THE FIRST AMENDMENT

Appellant concedes that "peaceful picketing . . . is a form of speech or writing within the meaning of the First Amendment" and that "the picketing was peaceful" in the instant case (p. 7, appellant's brief).

It is argued, however, that the Constitution does not protect "coercive picketing" (p. 70, *et seq.*, appellant's brief), or "picketing for an unlawful purpose . . . when there is plainly a clear and present danger that it may bring about substantive evils which Congress has a right to prevent" (Id., at p. 69). There is, as we now show, no merit to either of these arguments.

A. *Peaceful Picketing That Threatens Economic Injury is Within The Protection of The First Amendment*

Appellant's entire argument on what it calls "coercive picketing" (p. 70-83 of brief) is built upon the premise that speech which threatens economic injury" (p. 70) is beyond the protection of the First Amendment.

If that premise were at all tenable, then the First Amendment offers no defense whatever to any destructive legislative or judicial invasion of the "workingman's means of communication" (*Meadowmoor* case, at 293). For, obviously, every employee picket publicizing the facts of a labor dispute threatens economic injury to some employer.

The *Thornhill* opinion recognized the "coercive effect"[49] of picketing, saying (p. 104):

> ". . . It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advanta-

[49] Mr. Justice Douglas concurring in *Bakery & Pastry Drivers* v. *Wohl, supra*, p. 776.

geous relations with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society."

Nevertheless, the Court expressly held (p. 105):

"... that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in Section 3448."

See also *Cafeteria Employees' Union* v. *Angelos, supra; Thomas v. Collins*, 323 U. S. 516.

Similarly, in *American Federation of Labor* v. *Swing, Supra*, the Court held (p. 326):

"Communication by such employees of the facts of a labor dispute, deemed by them to be relevant to their interest, can no more be barred because of concern for the economic interest against which they are seeking to enlist public opinion than could the utterance protected in *Thornhill's* case."[50]

We need but briefly add to what has already been said herein (p. 24, *supra*) concerning the irrelevance of appellant's attempted analogy with cases under the Sherman Act. That Act condemns certain conditions regardless of the methods by which they are brought about. The instant statute does the opposite; it authorizes specified conditions but prohibits the means usually employed by workers to attain them.[51] If, for example, the hiring of more employees than are needed were a "restraint of trade" within the meaning of the basic policy and language of the Sherman Act, then, clearly, there is far more "restraint of trade"

[50] "Courts, though differing as to the allowable scope, pretty generally agree that picketing is a legitimate means of *economic coercion*, if it is confined to persuasion and is free of molestation or threat of physical injury or annoyance. *Frankfurter & Green, The Labor Injunction*, p. 31." (*Senn* v. *Tile Layers' Protective Union*, 222 Wis. 383, 268 N. W. 270.) (Italics supplied.)

[51] If the Sherman Act provided that persons may agree to fix and maintain prices but prohibited all persuasion or economic pressure to negotiate such agreements, then the two statutes would be analogous.

where a licensee enters into a contract to hire more employees (which is admittedly permitted by the instant statute) than where a union merely seeks to achieve such an agreement (which is prohibited by this statute). A statute which expressly legitimates a contract [52] in restraint of trade and only strikes down the methods of its attainment is not only not analogous with the Sherman Act but directly antithetical to its express language and obvious design.

The Sherman Act cases cited by appellant merely hold what appellee concedes, namely, that Congress may prohibit any acts taken in pursuance or execution of a conspiracy or combination outlawed by Congress. They do not hold that persons may not by speech or similar means seek objectives that are approved by Congress.

Equally unpersuasive is "The National Labor Relations Act analogy" (p. 74, *et seq.*, appellant's brief). Appellant here is trying to compare the superior economic power of employers over their employees with that of appellee over members of the American Federation of Musicians. The argument, as we understand it, is that just as in some cases the Court restrained employer speech because his superior economic power made it coercive so may appellee's speech be restrained because of his "authority over the musicians" (p. 77, appellant's brief).

We deny that there is any valid basis of comparing the power of employers over their employees with that of appellee over the membership of the Musicians' Union. But even assuming arguendo that they are comparable, it is clear beyond debate that the free speech cases under the National Labor Relations Act are totally irrelevant here. That Act deals directly with employer-employee relations, whereas the instant statute affects not at all the relationship between union officials and union membership. It is precisely because of that obvious distinction that Mr. Justice Douglas declared (*Thomas* v. *Collins*, *supra*) that the "National

[52] The very first phrase in the Sherman Act provides that "Every *contract* . . . in restraint of trade . . . is hereby declared to be illegal." (Italics supplied.)

Labor Relations Act cases would be relevant here if we were dealing with legislation which regulated the relations between unions and their members."

This phase of appellant's argument continues an erroneous assumption that appears throughout its brief, namely, that the statute prohibits conduct only on the part of omnipotent leaders of extraordinary well disciplined unions. Indeed, at some points of its argument appellant would almost make it appear that the only man in America to whom the statute could constitutionally apply is appellee, James C. Petrillo. The fact is, of course, that any such interpretation of the statute completely confounds its plain provisions. If the Lea Act means anything, it means that anybody, be he a union officer, a union member, a non-union employee, a potential employee, or anybody else, will be criminally prosecuted if he does anything that threatens to constrain or compel an employer to do any of the things listed under subsections (a) and (b) and permitted under subsection (c). As appellant readily concedes when arguing the question of discrimination, the Act extends "to practices by *anyone.*" (Italics supplied.) (P. 100, appellant's brief.)

An examination of the National Labor Relations Act cases cited by appellant further emphasizes their inapplicability. The first group cited (n. 29, n. 30, p. 74 of brief) deal with employer speech in the form of *threats of action expressly forbidden by law*, such as firing employees. Here, there is no threat of unlawful action; there is merely the truthful publication of the fact that a licensee has refused to grant an agreement that the law p[illegible] him to grant.

The second group of cases relied upon by appellant (p. 75 of brief) involve employer statements which, when considered in connection with other employer activities, were forbidden. These cases are readily distinguishable on the ground that the Lea Act prohibits all picketing for certain purposes specified regardless of any other circumstances surrounding such picketing. However, in view of the different opinions on this question expressed by various mem-

bers of this Court in the *Thomas* case, *supra*, it is well, we believe, to inquire more exhaustively into the essential differences between the National Labor Relations Act and the Lea Act.

The former statute is premised on the express Congressional finding, grounded in obvious reality, that the economic power of employers is superior to that of employees. In order to equalize that power, Congress adopted a policy of "protecting the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing" (Sec. 1). Pursuant thereto Congress carefully set up an elaborate and detailed administrative machine that would prevent employers from engaging in practices designed to frustrate the aforementioned employee rights—practices made possible by their dominant economic power.

The importance of the administrative machinery established by the National Labor Relations Act cannot be overemphasized. No employer who violates the National Labor Relations Act is subjected to direct criminal prosecution. It is only after an expert administrative tribunal has found in a particular case, after full investigation and formal hearing, that the employer has violated the Act that a cease and desist order expressly adjusted to the particular circumstances of that case is issued against the employer. Even then, the employer is not subjected to any sanctions until and unless the order is reviewed and adopted by a court.

Not so, of course, with the Lea Act. Here, there has been no express Congressional finding that employees in the broadcasting industry have greater economic power than employers in that industry, and, we add, such a finding would be absurd on its face. Here, there is no exhaustion of careful, administrative procedures before persons are subjected to sanctions. Here we have a criminal statute, employing general and all-inclusive language, which operates directly on any person using any means to compel certain approved action on the part of a licensee. "A decree,

arising out of a particular controversy and adjusted to it, raises totally different constitutional problems than those that would be presented by an abstract statute with an overhanging and undefined threat to free utterance." (*Meadowmoor* case, *supra*, p. 292).

Thus, even if the National Labor Relations Act treated employer statements in the same manner as it treated employer action, it would, we submit, be crucially different from the manner in which the Lea Act treats picketing. However that may be, in spite of the policy, design and operation of the National Labor Relations Act the courts have, because of the First Amendment, treated employer statements entirely different from employer action such as financial contributions to favored unions or discriminatory discharges. In *National Labor Relations Board* v. *Virginia Electric & Power Company*, 314 U. S. 469, the Court emphasized (p. 477) that

> "Neither the Act nor the Board's order here enjoins the employer from expressing its views on labor policies or problems, *nor is a penalty imposed upon it* because of any utterances which it has made." (Italics supplied.)

The Court merely said that the fact that speech accompanied a "complex" of unlawful activities does not prevent the Board from restraining the unlawful activity or from inquiring[53] into what the employer said.

> "If the Board's ultimate conclusion is based upon a complex of activities such as the anti-union background of the Company, the activities of Bishop, Ed-

[53] *May Department Store Co.* v. *National Labor Relations Board*, 326 U. S. 376, cited by appellant, also merely holds that the Board can consider statements made by employers as part of a course of unlawful conduct. It did not hold that the statement themselves could be restrained (p. 386):

> "We find no basis for eliminating the announcements or the publication *from consideration* on the ground that they were an exercise of the right of free expression, secured by the First Amendment. They are a part of the totality of Company activities and were properly received by the Board *as evidence* of the unilateral action of the employer." (Italics supplied.)

wards' warning to the employees that they would be discharged for 'messing with the CIO,' the discharge of Mann, the quick formation of the Independent, and the part which the management may have played in that formation, that conclusion would not be vitiated by the fact that the Board considered what the Company said in conjunction with what it did. The mere fact that language merges into a course of conduct *does not put that whole course without the range of otherwise applicable administrative power.* In determining whether the Company actually interfered with, restrained, and coerced its employees the Board *has a right to look at what the Company has said as well as what it has done.*" (Italics supplied; p. 477-478.)

The actual decision in that case was to remand the cause because "the Board specifically found that . . . utterances were unfair labor practices," and the Court would not "sustain a finding of coercion with respect to them alone" (Id., p. 479). That decision is plainly no authority for the proposition that speech on the part of persons enjoying and exercising dominant economic power is "coercive" in the sense urged by appellant, namely, that it is beyond the protection of the First Amendment.

In *National Labor Relations Board* v. *Ford Motor Co.*, 114 Fed. (2) 905, 913; certiorari denied, 312 U. S. 689, employer statements which the Board found "coercive" in their content and in the manner of their distribution were specifically made the subject of a Board mandate. The Court refused to enforce that order, saying (p. 914):

> "Nowhere in the National Labor Relations Act is there sanction for an invasion of the liberties guaranteed to all citizens by the First Amendment."
>
> . . . . . .
>
> ". . . To the argument of the Board that the potentiality of opinion to coerce is to be tested by whether it did in fact coerce, the Supreme Court in the same case [*Thornhill's* case, *supra*] makes answer: 'that . . . every expression of opinion on matters that are important has the potentiality of inducing action in the interest of one rather than another group in society'" (p. 915).

". . . We are forced to the conclusion that the findings of the Board declaring the Ford publications and their distribution to be in pursuance of an unfair labor practice, must be set aside and the appropriate provision of the order commanding restraint denied enforcement" (p. 915).

In *National Labor Relations Board* v. *American Tube Bending Co.*, 134 Fed. (2d) 993; certiorari denied, 320 U. S. 768, the whole record upon which the Board found unfair labor practices consisted only of employer statements which the Board found to be "coercive." The Court, on the authority of the *Virginia Electric & Power Company* case, *supra*, reversed the Board's order and dismissed the proceeding. See also *Big Lake Oil Co.* v. *National Labor Relations Board*, 146 Fed. (2d) 967; *Peter J. Schweitzer, Inc.* v. *National Labor Relations Board*, 144 Fed. (2d) 520; *Edward G. Budd Manufacturing Co.* v. *National Labor Relations Board*, 142 Fed. (2d) 922.

Thus, the actual decisions show that even where a statute is reasonably premised upon an express Congressional finding of unequal economic power, and even where the statute is so designed as to preclude any punishment except after the findings and conclusions of an expert tribunal in a concrete and particular case have been sustained by a court of law, nevertheless the First Amendment applies and prevents restraints upon or punishment of free speech. But if, as has been suggested, the free speech cases under the National Labor Relations Act cannot be distinguished from those following *Thornhill's* case, *supra*, we urge that "the remedy is not to allow" any legislature or court "improperly to deny the right of free speech but to apply the same rule and spirit of free speech cases whoever the speaker." (Mr. Justice Jackson concurring in the *Thomas* case, *supra*, p. 548.) [54]

[54] "Unless the right of free speech is enjoyed by employers as well as by employees, the guarantee of the First Amendment is futile, for it is fundamental that the basic rights guaranteed by the Constitution belong equally to every person." (*Midland Steel Products Co.* v. *National Labor Relations Board*, 113 Fed. (2d) 800, 804.)

B. *The Statute's Proscription of Speech Does Not Meet The Clear and Present Danger Test.*

As in its argument on the right to strike (p. 58 of brief) appellant argues that picketing for an unlawful purpose is not constitutionally protected (p. 83, *et seq.*). These arguments are premised on the suggestion that the instant statute outlaws objectives rather than means—a suggestion which, as we believe we have already fully shown,[55] is specious in the extreme. Appellant concedes that under the statute a licensee can lawfully agree to employ more persons than are "needed." If that agreement is lawful, and if to strike or picket to obtain such an agreement is declared criminal, then what is made unlawful is the means (the strike or picket) and not the objective (the agreement), and the most prolix sophistry cannot alter that simple syllogism.

But even if we assume what is plainly not the fact, namely, that this statute declares objectives to be unlawful, still such a declaration could not destroy the protection of the First Amendment. Such a device, if successful, would make the phrase "freedom of speech" an "empty"[56] one instead of the "vital"[57] liberty that this Court has "guarded with a jealous eye." For, it would only be necessary for the Congress or for the various state legislatures simply to declare traditional labor objectives to be unlawful, and thereby the workingman's means of communication would be completely obliterated and the very essence of free speech wholly destroyed. Under our concepts of freedom and our system of government no legislature can prejudge the merits of any controversy and thereby preclude that freedom of discussion and communication of ideas necessary to discover and spread political and econ-

---

[55] See pages 28, et seq. of this brief.

[56] *Schneider v. State*, 308 U. S. 147, 161.

[57] Ibid.

omic truths. No legislature can, by abridgment of freedom of speech, impair "those opportunities for public education that are essential to effective exercise of the power of correcting error" (*Thornhill*, at p. 95).

That the enjoyment of the Bill of Rights cannot be made contingent upon the changing winds of political doctrines was laid down in unmistakable language in the decision in *West Virginia* v. *Barnette*, 319 U. S. 624, where the Court stated (p. 638):

> "The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; . . ."

And in *Schneider* v. *State*, *supra*, it was held (p. 161) that

> ". . . Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maitnenance of democratic institutions."

The facts and the holding in the case of *Wohl*, *supra*, are completely applicable. A Teamster's local in that case picketed the customers of certain "peddlers" because those peddlers would not employ a union relief man, that is, because they would not employ a person who was not "needed." The New York Court held that a "labor dispute" within the meaning of the New York statute was not involved, or, put otherwise, that under that State's policy the purpose of the picketing was unlawful, and enjoined the picketing. This Court reversed that holding, saying (p. 774) that "one need not be in a labor dispute as defined

by a state law to have a right . . . to express a grievance in a labor matter."

To the same effect is the decision in the *Swing* case, *supra*. There, too, it was the established policy of the State to prevent picketing in the circumstances there involved. But this Court declared (p. 326) "The scope of the Fourteenth Amendment is not confined by the notion of a particular State regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the State."

We do not here contend that the Constitution vests an absolute right to picket or strike. It is conceded that even these basic liberties may, in appropriate circumstances, be subject to reasonable regulation or restraint. But, "the power of a State to abridge freedom of speech and of assembly is the exception rather than the rule and . . . must find its justification in a reasonable apprehension of danger to organized government." (*Herndon v. Lowry*, 301 U. S. 242, 258.)

Legislatures or courts may not deprive persons of their civil liberties by the easy method of declaring unlawful the purposes for which they may be exercised. They can only justify such deprivation to prevent a "clear and present danger" to some "substantive evil." *Schenk* v. *United States*, 249 U. S. 47, 52; *Thornhill* v. *Alabama*, *supra*, p. 105; *Cantwell* v. *Connecticut*, *supra*, 311; *Thomas* v. *Collins*, *supra*, p. 527.

In the *Bridges* case, *supra*, the Court analyzed the leading cases dealing with the clear and present danger doctrine and reached this conclusion (p. 263):

> "What finally emerges from the 'clear and present danger' cases is a working principle that the *substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished*... Those cases do not purport to mark the furthermost constitutional boundaries of protected ex-

pression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech or of the press.' *It must be taken as a command of the broadest scope that explicit language read in the context of a liberty loving society, will allow.*" (Italics supplied.)

Since the only possible evil to which the picketing in the instant case has been addressed is that of hiring excessive employees, and since the Congress has expressly legitimated agreements for the employment of excessive employees, it is plain that what we have here is hardly an evil much less an "extremely serious" evil.

If, as the statute affirmatively declares, WAAF may agree to employ more persons than are "needed," by what possible reasoning can it be said that the Musicians' Union may not announce to the world—by picket or otherwise—that WAAF has refused to enter into such an agreement? What is so sacrosanct about the refusal of WAAF to comply with the union's lawful demand as to render criminal the truthful publication of that fact? What "clear and present danger" to what "substantive evil" is created by such publication? The answers, we submit, are self-evident. Emotion, not reasoning, attended the introduction and enactment of this statute. There is nothing so sacrosanct about any licensee's acceptance or rejection of any lawful union demand as to justify a blackout on publicity. It is hardly an "evil" to seek employment, and the only "danger" involved is to the licensee's profits. All that we have here is a simple labor dispute between Station WAAF and the Chicago Federation of Musicians, and "the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution." (*Thornhill's* case, p. 102.)

III

THE STATUTE IS CONTRARY TO THE THIRTEENTH AMENDMENT

All of the arguments advanced in connection with our discussion on the right to picket apply equally to the right to refuse to work. For, "like the right to make a speech," the right to "refuse to work, and to choose the terms and conditions under which one will work," is a "fundamental human liberty which the State may not condition or abridge in the absence of grave and immediate danger to the community." (*Stapleton* v. *Mitchell*, 60 F. Supp. 61.)

Analyzed, appellant's argument actually would compel the conclusion that Congress has unlimited power to force persons to work against their will for the private profit of others. If, for example, the statute made it criminal for any person to compel a licensee by any means to pay more wages than are needed, then appellant's reasoning here is applicable to the last detail, and, if correct, such a statute would have to be upheld. Appellant would argue that the right to strike is not absolute, that the peaceful strike is coercive, that the objective of obtaining excessive wages is unlawful even though the licensee can voluntarily agree to grant them (because Congress would be relying upon the self-interest of the licensee not to grant excessive wages), and that it would be reasonable for Congress to impose that limitation because excessive wages would ruin many small radio stations and thereby limit the service of radio to the public.

Nor is that example entirely hypothetical. As we have shown, the enactment of this statute is merely the culmination of an extended struggle between the owners of the radio broadcasting industry and their musician employees "as to the share or division between them of the joint product of labor and capital." (Mr. Chief Justice Taft in *American Steel Foundries* v. *Tri-City Central Trades*

Council, supra, p. 209.) The demand for the employment of more workers is, plainly, a demand on the employer to pay more wages to more persons. We cannot conceive that a simple strike for wages or for any other economic advantage which is approved by the Congress can, under our Constitution, be outlawed. "We are not advised of any rule of law under which any man in this country will be forced to serve with his labor any other man if he does not wish to serve." (*Henderson* v. *Coleman,* 7 Sou. (2) 117 (Fla.).)

Recently, this Court has said that "No State can make the quitting of work any component of a crime or make criminal sanctions available for holding unwilling persons to labor." (*Pollock* v. *Williams,* 322 U. S. 4, 18.) And that, we submit, is precisely what Congress has done in passing the Lea Act.

In *Stapleton* v. *Mitchell, supra,* it was held:

> "The right to peaceably strike or to participate in one, to work or refuse to work, and to choose the terms and conditions under which one will work, like the right to make a speech, are fundamental human liberties which the State may not condition or abridge in the absence of grave and immediate danger to the community. But by Section 8(3), (12), (13), the State of Kansas has not only conditioned these rights, but expressly prohibited them and made their exercise a criminal offense. In this setting we think it is the inherent prohibitions of the statute standing alone which impose the unconstitutional restraint, and those against whom the statute is plainly directed should not be required to abide the processes of criminal justice in order to obtain the redress to which they are entitled under the Federal Constitution."

In *Alabama State Federation of Labor* v. *McAdory, supra,* the Court said:

> "And we think it is well-settled that the members of a labor organization—that is, workmen who are not bound by contracts for a definite period and have not,

by agreement freely made, given up such rights—may, without liability, abandon their employment at any time, either singly or in a body, as a means of compelling or attempting to compel, their employers to accede to demands for better terms and conditions . . . ."

In *Bailey* v. *Alabama*, 219 U. S. 219, this Court held with respect to the Thirteenth Amendment that (p. 241):

> "The plain intention was to abolish slavery of whatever name and form and all of its badges and incidents; to render impossible any state of bondage, to make labor free by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit, which is the essence of involuntary servitude."

Never since the adoption of the Thirteenth Amendment has any statute enacted by the Congress or by any other legislature in this country gone to the incredible extreme of the Lea Act. Under it a single individual is chained to his job, a single employee may not quit his employment with a licensee in furtherance of any of the objectives listed in subsections (a) and (b). Thus, if Station WAAF had employed a single musician, and if that musician demanded that three additional persons be employed and if he quit upon rejection of that demand, he would have violated the statute no less than has appellee James C. Petrillo.

Even the Smith-Connally Act (Public Law 89, 78th Congress), passed as an extraordinary war emergency measure, was careful to provide:

> "Sec. 6(a): "No individual shall be deemed to have violated the provisions of this section by reason only of his having ceased work or having refused to continue to work or to accept employment."

Appellant makes reference to the case of *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, in which this Court "implied" (p. 55, appellant's brief) that the provision in the Railway Labor Act prohib-

iting, for a period of thirty days, any changes in conditions out of which the dispute arose was a lawful "limitation upon 'the right to strike'." (Ibid.) But this Court was careful to observe that (p. 566):

> "The provision of Sec. 10 is to be read in connection with the qualification in subdivision eight of Sec. 9 that nothing in the act shall be construed to require an individual employee to render labor without his consent or as making the quitting of service by an individual employee an illegal act, and that no court shall issue any process to compel the performance by an individual employee of labor without his consent. The purpose of this limitation was manifestly to protect the individual liberty of employees . . ."

Except in circumstances not here relevant,[58] there is no logical theory under which the quitting together by two or more enjoys less constitutional protection than the right of a single individual to leave his employment, particularly if the concerted quitting is for an economic purpose deemed

---

[58] We know of no case wherein this Court has expressly held that a concerted cessation of work is prohibited by Section 10 of the Railway Labor Act, and that such prohibition is constitutional. However, whatever ultimate disposition the Court may make of this provision in the Railway Labor Act, it can have no bearing on this case for these reasons:

1. It is a regulation of the right to strike and not a flat prohibition. The right to strike must be held in abeyance only for a short, limited period of time.

2. It expressly preserves the right of the individual employee to quit his work under any circumstances.

3. The provision is addressed to employers as well as to employees. The former, too, may not do anything to change existing conditions for the prescribed period.

Appellant also cites the recent case of *United States* v. *United Mine Workers of America*, Nos. 759-760, decided March 6, 1947, in its section of the brief dealing with the Thirteenth Amendment. Although it is cited in support of its argument that no one has the constitutional right to order others not to work, nevertheless it is well to point out that that case does not hold by implication or otherwise that usual peaceful strikes for lawful purposes may be restrained. That case, it will be recalled, involved an order issued by defendant Lewis to *government* employees to strike in presumptive breach of contract and in presumptive violation of a statute passed by Congress in the exercise of its extraor-

necessary for their protection and approved by the law. Surely, there is far greater moral justification for a concerted leaving of employment because of working conditions which the workers consider self-destroying than for an individual's leaving of employment for purely arbitrary reasons. A prohibition under threat of criminal penalty against leaving work, whether imposed on one, one hundred, or one thousand employees is a sovereign command to continue working, and nothing can contravene the fact that involuntary servitude is thereby imposed.

IV

THE STATUTE IS REPUGNANT TO THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

A. *The Phrase "Number of Employees Needed by Such Licensee" is Vague, Indefinite and Uncertain.*

Section 506(a)(1) contravenes the due process clause of the Fifth Amendment because it is not sufficiently explicit in defining the new offense. We invoke the familiar principle "that a criminal statute which defines the offense in such uncertain terms that persons of ordinary intelligence cannot in advance tell whether a certain action or course of conduct would be within its prohibition is subject to the attack of unconstitutionality as violative of . . . due process" (83 L. Ed. 893).

In *Connally* v. *General Construction Company*, 269 U. S. 385, the Court nullified a State statute requiring a contractor, under penalty, to pay his employees "not less than the

---

dinary war powers. Moreover, it may be fairly assumed that this Court adopted the interpretation placed upon the injunction of the Court below to the effect that it did not apply to the miners themselves. (See Record of that case, pp. 169, 173, 177, 178.). "Such a decree, arising out of a particular controversy and adjusted to it, raises totally different constitutional problems from those presented by an abstract statute with an overhanging and undefined threat to free utterance." (*Meadowmoor*, p. 292.)

current rate of per diem wages in the locality where the work is performed" as being so uncertain as to deprive the contractors of due process of law. The Court said (p. 391):

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law . . .
>
> . . . . . .
>
> ". . . Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another."

In *Lanzetta v. New Jersey*, 306 U. S. 451, the Court declared an anti-gangster law unconstitutional because of vagueness and uncertainty, saying (p. 453):

> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids . . ."

In *United States v. Cohen Grocery*, 255 U. S. 81, the Court affirmed the following ruling of the Court below:

> "Therefore, because the law is vague, indefinite and uncertain, and because it fixes no immutable standard of guilt, but leaves such standard to the variant views of the different courts and juries which may be called on to enforce it, and because it does not inform defendant of the nature and cause of the accusation against him, I think it is constitutionally invalid . . ."

See also *Weeds* v. *United States*, 255 U. S. 109; *International Harvester Company* v. *Kentucky*, 234 U. S. 216, 221; *Collins* v. *Kentucky*, 234 U. S. 634; *Herndon* v. *Loury*, *supra*; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445.

The gravamen of the crime set forth in Section 506(a)(1) is the compulsion of a licensee "to employ any person or persons in excess of the number of employees needed by such licensee to perform actual services." The objective and subjective criteria which determine the number of men employed for any given job (such as the financial resources of the employer, the complexity of the task, the desired quality of the product, the skill of both those who manage and those who labor, the employer's sociological views, the employees' energy and cooperativeness, and a legion of others) are necessarily, so varied, abstract and elusive as to preclude their condensation into any standard sufficiently definite to meet the requirements of the rule against vagueness.

The debate in the Senate reflects the uncertainty and indefiniteness of the challenged language. Senator Johnson first said it was "the district attorney who makes the determination whether they have more than they need."[59] Later, upon Senator O'Mahoney's statement that "I have read the Conference Report from beginning to end, and I find no language in it which provides who shall determine whether or not the number of employees which the employer must employ is in excess of the number required to perform a certain function," Senator White, another manager of the bill, categorically stated, "I would say, without hesitation, that in all instances the employer should determine the question."[60]

Thereafter, the following colloquy took place:

> "Mr. O'Mahoney: But I am asking who determines whether or not the number of employees is in excess of the number needed.

[59] 92 Cong. Rec., p. 3245.

[60] Id., p. 3256.

"Mr. Johnson: The Court.

"Mr. O'Mahoney: Oh, no; because here we are condemning a certain act. If we are to condemn an act we must know precisely what the act is which we condemn."[61]

It matters not, of course, whether it is the district attorney, the employer or the court who was intended by Congress to make that crucial determination. What certainly matters, what is indispensable to elementary justice and fair play, is that reasonable persons subject to the statute be sufficiently informed so as definitely to know *at the time of performing an act* that it is a crime. Here, there is nothing remotely resembling an informing guide or standard.

Congress has gratuitously given to licensees the extraordinary power to subject their employees to criminal prosecution almost at will. All they need do is arbitrarily to discharge a large number of employees on the assertion that they are not needed. Any resistance on the part of the employees by strike, picket or otherwise would expose them to criminal prosecution.

The Court may take judicial notice of the large number of labor disputes that occur as a result of wholesale discharges, arbitrary or otherwise. Employees in all other industries have the full and unquestioned right to challenge such action by their employers without fear of prosecution or imprisonment, and the right thus possessed by these other employees effectively prevents many employers from wanton discharges. But this statute gives to employers in the radio broadcasting industry the privilege to be as contemptuous and dictatorial as the caprice of any moment may direct and arbitrarily to deprive their employees of their means of livelihood. All they need do is make the self-serving declaration that the number discharged are not "needed" and the employees can take no effective action in reply without subjecting themselves to the probability of prosecution and jail. The full absurdity of this

[61] Ibid.

situation is realized upon consideration of the fact that an orchestra leader, honestly exercising highly skilled and artistic judgment as to the number of persons "needed" to perform a musical rendition, would be subjected to prosecution and the possibility of jail if a licensee, motivated only by venal standards of gain and profit, should disagree.

The Government's argument on this point begins with an extensive reference to and a highly legalistic interpretation of the isolated comments of various Congressional supporters of the bill in order to show what Congress "was driving at." (P. 110 of appellant's brief.) Appellant's effort is, we submit, ludicrous on its face. It concedes that Congress has in fact used indefinite language in the statute itself but relies upon its research into and analysis of the legislative history of the statute to dissipate that vagueness. Appellant forgets that the rule against vagueness is addressed to the language of the "penal statute" itself, and that it protects the "ordinary person" (*Connally* case, p. 33) who, of course, can hardly be expected to become completely familiar with the legislative debates or to be possessed of the unique skill at interpretation displayed by appellant.

The next argument advanced by the Government is that because the bill was amended so as to read "needed by such licensee" instead of "wanted by such licensee," therefore the "whim" of the licensee does not interpret the guilt of others. The important and only relevant point here is whether the standard of conduct prescribed by the statute is sufficiently definite, and appellant does not and cannot show that the word "needed" makes that standard any more definite or less vague than the word "wanted." Indeed, the contrary is true. Whatever other constitutional obstacles[62] to the enactment of the original language, it is

---

[62] It would, plainly, shock our concepts of justice and due process to make imprisonment of one person contingent upon the desire or whim of another. "The state of mind of the truck owner cannot be decisive of

less offensive to the rule against vagueness. For, the number of employees a licensee wants is made definite and clear every time he accepts or rejects a request for additional employment.

Appellant next engages in the "difficult" "process of matching words and phrases in" other statutes although it concedes "that the question in each case must ultimately be one of judgment based largely on the context of the particular law and the subject with which it deals." (P. 129, appellant's brief.) The conclusion reached is that "if it is thought that the text of the law itself is not sufficiently definite," then the principles contained in other cases may "point to a correct decision here" (ibid.), meaning, we presume, a decision by this Court. If, indeed, "the text of the law itself is not sufficiently definite," then the law must fall. It cannot be saved by virtue of the ability of this Court—as distinguished from that of the "ordinary person"—to perform the difficult task of abstracting principles from a host of other cases dealing with different statutes.

In arguing the point of scienter or willfulness before the Court below, appellant introduced the case of *Screws v. United States, supra,* and on its authority insisted "that the claim that a statute leaves a defendant in doubt as to whether he is committing a crime is unavailable when the crime must consist of conduct which is willful." (P. 57, Government's brief below.) Here, appellant is more restrained. It is careful to "not suggest that the presence of a requirement as to willfulness will without more be sufficient in a statute to satisfy the constitutional requirement" (p. 124, appellant's brief), and then seeks to dis-

---

the guilt of these defendants." (*United States* v. *Local 807*, 315 U. S. 521, 532.) While the language finally adopted by Congress is not so extreme, it is, we submit, because of the manner in which it vests so extraordinary a weapon in the hands of licensees (see discussion p. 55, *supra*), sufficiently harsh to violate due process.

tinguish the very *Screws* case, *supra*, which it introduced and upon which it placed its main reliance below.

It is, we submit, self-evident that an indefinite criminal statute cannot, in the language of the dissenting opinion in the *Screws* case (p. 153) "be rendered definite by requiring that a person 'willfully' commit what Congress has not defined but which, if Congress had defined, could constitutionally be outlawed." And the opinion of Mr. Justice Douglas in that case is in full agreement. He makes it crystal clear that under the Constitution one cannot be criminally punished for any act which is not clearly defined, no matter how willfully that act is performed. He said (p. 104):

> ". . . For the specific intent required by the Act is an intent to deprive a person of a right *which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them.* . . . He violates the statute not merely because he has a bad purpose but *because he acts in defiance of announced rules of law.* He who defies a decision interpreting the Constitution knows precisely what he is doing. If sane, I hardly may be heard to say that he knew not what he did. *Of course, willful conduct cannot make definite that which is undefined.* But willful violators of constitutional requirements, *which have been defined,* certainly are in no position to say that they had no adequate advance notice that they would be visited with punishment. When they act willfully in the sense in which we use the word, they act in open defiance or in reckless disregard of a constitutional *requirement which has been made specific and definite.* (Italics supplied.)

Thus, the unanimous view of this Court in the *Screws* case, the most recent and comprehensive expression on the question of indefiniteness, makes it clear that there is no magic to the word "willful," and that the Constitution of the United States still requires definiteness and certainty in criminal statutes. The phrase "in excess of the number

of employees needed" is nowhere "made specific"; not in "the express terms of the Constitution or Laws of the United States," not in any of the "decisions interpreting them," and not even by reference to any custom or practice in the radio broadcasting industry or in any other industry. It is a phrase that is totally vague and indefinite and, upon the uncontroverted authority of the decisions of this Court, repugnant to the due process clause of the Fifth Amendment.

In *United States* v. *Ragen*, 314 U. S. 513, the evidence showed that defendants had, under the pretext of taking "a reasonable allowance for salaries," made unconscionable deductions on their income tax returns and had, indeed, destroyed old records, manufactured back-dated corporate minutes, and the like. This retroactive manipulation of the corporation's records was done after defendants had learned of a decision of the Board of Tax Appeals which would have exposed them to greater tax liability than they owed under the true records. In the face of such evidence, the Court found little difficulty in applying a statute providing that "any person who willfully attempts in any number to evade or defeat any tax . . . shall . . . be guilty of a felony." Moreover, the Court pointed out that the phrase "reasonable allowance" was one of long standing and well-understood meaning.[63] The Court said (p. 524):

> ". . . The statutory specification of permissible deduction here in question is of long standing. For years thousands of corporations have filed income tax returns in accordance with the direction to deduct 'a rea-

[63] Appellant would make light of the factor of the age of the statute in determining the question of vagueness. (P. 121, appellant's brief.) This Court has emphasized that factor in virtually every case where the issue of indefiniteness was raised, and the Court found sufficient definiteness. Indeed, the rule itself, as formulated by this Court, always refers to statutes "creating a *new* offense." It is self-evident that any phrase, no matter how abstruse originally, will and does, after a long experience of application and interpretation, acquire concrete and clear meaning.

sonable allowance for salaries or other compensation for personal service actually rendered,' and there has not been any apparent general confusion bespeaking inadequate statutory guidance. A finding of unconstitutional uncertainty in this section of the act as applied here would be a negation of experience and common sense."

The statute involved in *Gorin v. United States*, 312 U. S. 19, punished persons who obtained or delivered information "connected with" or "relating to" the "national defense" with "intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation."

The Court suggested that if the statute punished persons for merely obtaining or delivering information relating to or connected with the national defense, there would be a serious question as to its validity (p. 26). But the statute required more than that, it required a person to obtain or deliver such information with the specific purpose of harming the United States. Surely, a person who deliberately goes about obtaining or delivering national defense information for that purpose is doing a definite act which he and every other reasonable person knows to be criminal. Moreover, here again, the Court pointed out that the phrase "national defense" had a long statutory history and "a well understood connotation." (P. 28.)

Appellant ends its discussion on the question of indefiniteness with the statement that "appellee has no standing to contend that the Act is too indefinite." (P. 131, appellant's brief.) Why not? Since when has it become the rule of this land that any person, be he a labor leader or anyone else, is without enough status even to "contend" that a statute which threatens his liberty is unconstitutional for indefiniteness or for any other reason?

The reasoning presented by appellant in support of its statement is no less incredulous than the statement itself.

It is said that the information having charged a willful violation of the statute, "there can be no doubt the Act has been violated." (Ibid.) But the question before this Court is not whether appellee has violated the statute but whether the statute violates the Constitution—a question which appellee, consistent with accepted and established procedures, most properly raised by his Motion to Dismiss.[64]

Appellant goes on ingenuously to announce "the principle that a litigant can challenge the validity of an Act only when it is applied to his own disadvantage." (P. 132, appellant's brief.) Does appellant seriously mean that the instant statute is not being applied to the disadvantage of the defendant?

We submit that appellant's long and torjuous argument merely reflects the impossibility of its task. It simply cannot prove the existence of light where darkness prevails; it simply cannot persuade that Section 506(a)(1) meets the elementary requirement of definiteness in a criminal statute creating a new offense.

B. *Equal Protection of The Laws*

The Fifth Amendment has been construed to be broad enough to include equal protection of the laws (*United States* v. *Yount*, 267 Fed. 861, 863); and, in any event, it restrains "such discriminatory legislation by Congress as amounts to a denial of due process." (*Hiroboyashi* v. *United States*, 320 U. S. 81, 100.)

We accept the rule laid down in *Metropolitan Casualty Insurance Co.* v. *Brownell*, 294 U. S. 580, 584, and cited by appellant (n. 35, p. 98 of appellant's brief): "A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may

---

[64] In the *Connally* case, supra, the issue of indefiniteness was raised on a motion to dismiss, and in the *Cohen* case, *supra*, the issue was raised on a demurrer.

be conceived to justify it." We submit that there is no state of facts that exists or that can reasonably be conceived in justification of the discrimination explicit in the Lea Act.

That statute, of course, is an attempted exercise by Congress of its constitutional power to regulate commerce. The most that can be said is that Congress had reached the conclusion that it would best serve the public policy of the interstate commerce of broadcasting for licensees to employ only "needed" workers, to broadcast foreign programs, to broadcast educational and cultural programs, and so forth. To be consistent Congress should have provided for the restraint or punishment of all persons responsible for practices in the broadcasting industry that Congress found objectionable.

If it is undesirable for unions to exercise their economic power to seek the prevention of, say, foreign broadcasts, it is, of course, equally undesirable for licensees to exercise their economic power directly to accomplish the very same thing. From the point of view of interstate or foreign commerce, which is the only criterion by which the validity of this Congressional enactment can be supported, the evil lies in what is done and not in who has done it. Obviously, the effect on interstate commerce is no less harmful where the licensee arbitrarily or for good business reasons refuses to broadcast a foreign program than where a union arbitrarily or for good economic reasons refuses to work for any licensee that does broadcast foreign programs.

The extreme discrimination worked by the statute is readily illustrated. Suppose, for example, that the American Federation of Musicians entered into a mutually advantageous agreement with the British union of professional musicians whereby the parties undertook to encourage foreign broadcasts to their respective countries. Such an agreement would, of course, be altogether consistent with one of the ostensible aims of the statute. Suppose,

too, that in furtherance of that agreement the American Federation of Musicians threatened to strike or picket any licensee that refused to broadcast a British program. That kind of economic pressure is not proscribed by the statute; indeed, it, too, would be in complete harmony with it. Yet —the licensee could, with complete impunity, disregard the union's demand, resist the pressure and refuse to broadcast the foreign programs.

Similarly, the union could strike a licensee in furtherance of a demand to broadcast educational programs or to achieve the converse of any of the objectives listed in the statute, and the licensee can lawfully refuse those demands —can successfully impose the very conditions which the union, under the statute, may not seek by the most peaceful and legitimate means.

Not only are licensees empowered under the statute to impose any of the conditions for which employees may not strike, picket or boycott, but also, it is clear that they have done so in the past for their own reasons—that is, without reference to union demands—and will continue to do so in the future. The statute itself recognizes that by expressly legitimatizing any contracts "heretofore or hereafter" made, embodying those conditions. (Subsection (c).)

Appellant attempts to meet this point with the bland assertion that "Congress could reasonably assume that an employer's normal self-interest would adequately protect the public in this respect." (P. 13, appellant's brief.) That, we submit, confounds common sense and common experience. To assert that licensees or any other group of employers have, in pursuit of their profits, demonstrated a sensitivity to the public's interest and welfare that has not at least been equalled by that of their employees is merely to articulate a prejudice that is completely without foundation in fact.

On June 18th of last year, to cite a ready example, the National Broadcasting Company of its own volition refused

a request to broadcast a program from the National Music Camp at Interlochen.[65] That refusal was just as effective, and considerably more direct, in keeping the Interlochen program from the air as anything the Musicians' Union has done or might do. Only a flagrant disregard for equal treatment would result in imposing criminal penalties on the Musicians' Union for striking against the inexpensive competition of amateurs and at the same time giving full latitude to the National Broadcasting Company to refuse to broadcast an amateur program that pays nothing, in place of a commercial program from which it would derive profit.

A broadcasting company which arbitrarily refuses to broadcast a single foreign program is not in violation of this law. Not long ago, for example, the National Broadcasting Company refused to broadcast a Toscanini program from Milan, Italy. A union of workingmen, however, faced with economic destruction by the competition of cheap foreign labor, may not, under threat of imprisonment, refuse to work for a broadcasting company which will not control and minimize that competition. That is not reasonable classification—it is discrimination to the point of being grotesque.

There is a further discrimination as between employees of the broadcasting industry and employees of all other industries that are in interstate commerce. It will not be denied that employees in such other industries have the unquestioned right to employ peaceful means in pursuance of the same or similar objectives which are denied to employees of the broadcasting industry. Nor can it be effectively denied that the attainment of those ends by employees in other industries has had a different or less substantial impact on interstate commerce.[66]

---

[65] *New York Times*, June 18, 1946.

[66] On page 13 and elsewhere of its brief, appellant says that there has been no showing of similar practices in other interstate industries. We believe the Court may take judicial notice of the fact that these practices

How can it be said that it is a burden on interstate commerce for the Chicago Federation of Musicians to demand the employment of three additional employees by Station WAAF, that it is an evil to be condemned and outlawed, and that it is not a burden on interstate commerce or any evil for the same Chicago Federation of Musicians to make a similar demand on the neighboring motion picture studio or chain hotel. The truth is, of course, that it is not a greater burden on interstate commerce in the broadcasting industry than it is in the motion picture or the chain hotel industry. The truth is that Congress has given privileged and unjustified consideration to the broadcasting industry. Demands for additional employment and for all the other objectives specified in subsections (a) and (b) of the Act are made by musicians on all—licensees and others—of their employers, and similar demands are made by virtually every other union in this country on employers in interstate commerce. Legislation that singles out for criminal treatment one segment of one industry for practices that are engaged in by all segments of that industry and by all segments of all industries is unreasonably one-sided and hence repugnant to the due process clause.

There is still further discrimination in this statute as between employees other than musicians in the broadcasting industry and employees in other interstate industries. Appellant argues that Congress, because of the record before it, could meet the evil it allegedly found without encompassing all other potential evil doers. Even assuming

---

are universal. See, for example, Slichter, *Union Policies and Industrial Manggement*, The Brookings Institution, 1941, and particularly Chapter 6 thereof. The chapter is styled "Make-Work Rules and Policies" and is broken down into the following sub-divisions: "Limits on Daily or Weekly Output," "Indirect Limits on the Speed of Work," "Controlling the Quality of Work," "Requiring Time-Consuming Methods of Work," "Requiring that Unnecessary Work be Done or that Work be Done More Than Once," "Regulating the Number of Men in a Crew or on a Machine or Requiring the Employment of Unnecessary Men," "Requiring that Work be Done by Members of a Given Skilled Craft," "Prohibiting Employers or Foremen from Doing Journeymen's Work."

the validity of any Congressional finding that the musicians have been engaging in excessive practices, which we flatly deny, nevertheless it would in no way justify the many severe restraints imposed by the statute on non-musician employees in the radio broadcasting industry, since it has nowhere been suggested that the activities of these employees in any way differ from those of any other employees in interstate industries.

C. *The Statute Destroys the Right to Bargain Collectively, Which is a "Liberty" Within the Meaning of the Fifth Amendment.*

The seeming preservation of the right to bargain collectively and enter into a collective agreement by subsection (c) of the statute is wholly illusory. Actually, the statute destroys the liberty of employees of licensees to enter into agreements with their employers because it demolishes that "equality of position between the parties in which liberty of contract begins." (Mr. Justice Holmes in *Coppage v. Kansas*, 236 U. S. 1, 27.)

We are not suggesting that the framers of the Bill of Rights in 1791 were thinking of collective bargaining when they devised and adopted the Fifth Amendment, but "provisions of constitutions are vital, not formal. Their significance is to be gathered not simply by taking the words of the dictionary, but by considering their origin and *the line of their growth.*" (Mr. Justice Holmes in *Gompers v. United States*, 233 U. S. 604, 610. (Italics supplied.) The growth of collective bargaining has been such that today, we submit, it is clearly subsumed by the word "liberty" in the Fifth Amendment. In *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U. S. 1, 33, the Court recognized the constitutional statute of collective bargaining when it said:

> "That [the right to bargain collectively] is a *fundamental* right. Employees have as clear a right to or-

ganize and select their representatives for lawful purposes as the employer has to organize his business. Long ago we have said that labor organizations were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; if the employer refused to pay him the wages he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; union was essential to give laborers opportunity to deal on an equality with their employer."[67] (Italics supplied.)

The essence, of course, of any bargain is the granting of some valuable right which the bargaining parties may otherwise lawfully withhold. Manifestly, the only things of value which employees have to offer to their employers are their skill and energy. Under elementary principles of justice and in consonance with the universal practice attending negotiation of all manner of contracts they should be allowed to withhold their skill and energy. The instant statute says, in one breath, that agreements embodying specified conditions may be entered into by licensees and their employees, but in the next it takes away from those employees the only effective means they have of negotiating such agreements. The following comments of Senator La Follette in the course of the debate forcefully show how this statute deprives employees of licensees of their liberty to bargain collectively:

> "The Senator from Vermont stated that the prohibitions in the specified category would deprive anyone in the future from using his collective bargaining power, and ultimately his right to strike, if necessary, in negotiating a new contract . . . As I understand, . . . when the time comes to negotiate new contracts . . .

---

[67] "The right of employees to organize for collective bargaining . . . and to unite for concerted action in other respects is now so clearly recognized as a *fundamental* right that citation is superfluous." (*National Labor Relations Board* v. *Ford Motor Co.*, *supra*, p. 913.) (Italics supplied.)

> artists' and writers' guilds will not be in the same position in which they were when they negotiated their contracts in the first place . . . They would be prohibited from using their collective bargaining power or their right to strike if the broadcasting company refused to incorporate such a provision in a new contract . . . The ultimate power which gives a union or a guild any economic power in relation to the employer is its collective right, if it cannot obtain terms and conditions which it thinks equitable and just, to refuse to work any longer for the employer. . . . The point is that we would deprive these people of the right to quit work collectively, which is the right of all other employees in the United States. As a result, when they came to renegotiate their new contracts . . . the prohibitions contained in this measure would prevent them from using the right and the power which they had when the contract was negotiated this year . . . When the time came to renegotiate the contract they would be deprived of that right; and . . . then all the companies could simply say, 'Oh, well, that is prohibited. We are not going to have that in the contract.' All the companies could get together and agree about that. There is nothing in the measure to prohibit them from banding together and saying, 'Since Congress has made this unlawful, we will not even enter into negotiations about it with you.' "[68]

Our national policy on labor relations is predicated upon the recognition of the self-evident fact that the individual employee cannot effectively bargain with his employer; that only through combination and collective action can equality of bargaining power be attained.

In *American Steel Foundries* v. *Tri-City Central Trades Council, supra,* Chief Justice Taft laid down that basic principle, which has since been incorporated in Congressional legislation. He said (p. 209):

> "They [labor organizations] were organized out of the necessities of the situation. *A single employee was helpless in dealing with an employer.* He was de-

[68] 92 Cong. Rec. 3251.

pendent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. *Union was essential to give laborers opportunity to deal on equality with their employer.* They united to exert influence upon him and *to leave him in a body in order by this inconvenience to induce him to make better terms with them.* They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such a lawful purpose has in many years not been denied by any court. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital." (Italics supplied.)

Judge Sackmann, Judge of the District Court in and for the City and County of Denver, Colorado, eloquently stated the same proposition in *American Federation of Labor v. Reilly*, 7 Labor Cases, 65:

"It is emphasized that none of the plaintiff labor organizations, or those whom they represent, are engaged in any business for profit; that the members of said unions, having only the brawn of their muscles, the strength of their bodies, the alertness of their minds, the skill of their hands, and general ability of the average human being with which to support and maintain themselves and their families under a standard of living worthy of this great civilized Republic and constitutional government of the United States; because of the weakness and futility of individual action in a country like ours to obtain justice, fair treatment, careful and just consideration and solution of these vital problems and constitutional rights, have united themselves into labor organizations commonly called unions to obtain these just rights and benefits by collective bargaining; that they are, like religious organizations and political associations, simply groups of individuals gathered together and assembled together for the more effective exercise through joint action of the constitu-

tional rights to which each individual American citizen is entitled and may lawfully exercise jointly to obtain just hours, wages, working conditions and American standards of living for themselves and their families; . . ."

Section 2 of the Norris-LaGuardia Act, 29 U. S. C. A., Chap. 6, provides in part as follows:

> "Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, *the individual unorganized worker is commonly helpless to exercise actual liberty of contract* and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment . . ." (Italics supplied.)

And the "Findings and Policy" of Section 1 of the National Labor Relations Act (49 Stat. 449), too, refers to "the inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association."

The above authorities recognize what is undisputably true, that only by collective action can employees enjoy liberty of contract. Collective bargaining, if it is to mean anything, must include the right to collective withdrawal from work, the right to strike. By removing that right, the statute destroys collective bargaining in violation of the Fifth Amendment.

Conclusion

The Lea Act is, we submit, a direct assault on free trade unionism. For the first time in our history workingmen who resort to their traditional and peaceful methods to improve their economic standards and to obtain agreements that are admittedly lawful are declared criminal and subjected to long imprisonment and heavy fines. Never

before has Congress passed legislation that is so blatant an attempt to throw the full sovereign force of our national government in support of the owners of a single favored industry and in opposition to the workingmen and women in that industry.

There are deep, challenging economic problems in the broadcasting industry which have caused the difficulties that have eventuated in this statute. Neither the licensees nor the Congress have sought to understand and meet those problems in a constructive manner. Instead, the broadcasting industry has deliberately set up a bogeyman trap and Congress has, unfortunately, been ensnared. The result has been a piece of legislation which makes not an inch of progress in resolving the economic problems of the industry, but, rather, invokes principles and applies techniques that confound common justice and flout the basic principles of our Constitution. This legislation flies in the face of the calm and wise advice given by President Truman when he vetoed the Case Bill:[69]

> "Our problem in shaping permanent legislation in this field is to probe for the causes of lockouts, strikes and industrial disturbances. Then, to the extent possible, we must eliminate these causes. *Strikes against private employers cannot be ended by legislative decree. Men cannot be forced in a peacetime democracy to work for a private employer under compulsion.* Therefore strikes must be considered in the whole context of our modern industrial society. They must be considered in the light of inflationary pressures, of problems of full employment, of economic security.
>
> "Legislation governing industrial relations is workable only when carefully considered against this broad background." (Italics supplied.)

It is respectfully submitted that Section 506, Federal Communications Act of 1934, as amended, is, for the rea-

[69] *Washington Post*, June 12, 1946, p. 12.

sons hereinbefore set forth, unconstitutional and that the judgment of the Court below should therefore be sustained.

JOSEPH A. PADWAY,
HENRY KAISER,
HERBERT S. THATCHER,
736 Bowen Building,
Washington 5, D. C.

HENRY A. FRIEDMAN,
521 Fifth Avenue,
New York, New York.

DAVID KATZ,
175 West Washington Street,
Chicago, Illinois.
Counsel for Appellee.

APPENDIX A

The following letter is set forth on page 7 of hearings before the subcommittee of the Senate Committee on Interstate Commerce, 77th Congress, 2nd Session, pursuant to S. Res. 286, *Use of Mechanical Reproduction of Music*, 1942:

July 30, 1942.

Mr. James L. Fly, Chairman,
Federal Communications Commission,
Washington, D. C.

Dear Mr. Fly:

In answer to your inquiry of July 22nd as to our objection to the broadcast of the National High School Orchestra of Interlochen, Mich., and also in answer to many press releases reportedly coming from you in the matter of canned music, I will give you the entire picture.

First of all, the American Federation of Musicians welcomes a fair and impartial investigation of any of its past actions and whatever actions it may take in the future.

It has been stated in the press that I personally am the "czar" and that these actions are charged to me personally. This is not so. The American Federation of Musicians has a convention every year, and *this has taken place consecutively for the past forty-seven years.* The Federation action on canned music was taken by its convention in 1941 at Seattle, Washington, by unanimous vote of 518 delegates, representing locals of the United States and Canada. It was referred to our International Executive Board to be put into effect, and the subsequent acts were directed by that Executive Board. I did only what the convention and the Executive Board directed.

There are thousands, not hundreds, of school bands and orchestras, and these school bands and orchestras in 90 per cent of the cases receive instruction from members of the American Federation of Musicians. In Interlochen the conductors are also members of the American Federation of Musicians. The fact that the Interlochen band was on the

air for some twelve years shows plainly that we were not opposed to these boys and girls being on the air. However, Interlochen is not in as good a position as other school bands and orchestras, because Interlochen is a commercial proposition while in public schools throughout the country the children receive their tuition free. That is not the case at Interlochen where these children pay $275.00 for a period of eight weeks, plus additional fees for private lessons and other items. The fees paid by some of the pupils exceed $400.00 per season of eight weeks. This, in my opinion, puts the school squarely on a commercial basis. Radio advertisers pay the musicians and all other participants a commercial price for advertising their commodities, and the same rule should apply to this school.

That is not the sole reason for the Federation's protest; it is also necessary for the self-protection of the professional musician. Since the outbreak of the war, Army and Navy bands are on the air any number of times each day. This of course you can easily understand has taken up much music time on the air, so much so that the American Federation of Musicians was beginning to wonder whether there was going to be any work left for the professional musician. It is easy to understand that the more free music the radio stations receive, the less need for the professional. That was the primary reason for opposing the broadcasting of the concerts from Interlochen. It will be a sorry day for the professional musician if two-thirds of the air time is taken up by non-professionals. You must remember that this already is an over-burdened profession. In some of our locals unemployment reaches 60 per cent; in some 75 per cent; and in other locals as high as 90 per cent. If this continues, there will be no incentive for our children to become professional musicians, because after having studied for many years they will find themselves in a starving profession. These same children in Interlochen may become professionals ten years from now, when they and their families will resent other children taking away their bread and butter, under the guise of educational purposes.

The originating programs emanate from New York, Chicago and Los Angeles. Each of these three locals has

closed shop conditions with the broadcasting networks, in spite of which the American Federation of Musicians in many cases has not objected to school bands and orchestras going over the air occasionally.

Many of the school boys and girls studying music, and many of them at Interlochen, are sons and daughters of members of the American Federation of Musicians, and if the fathers of these children are not able to make a living, then the children could not get an education because there would be no money to pay for same.

It has been said that if they do not go over the air there would be no incentive to study music. What incentive did the good old-time musicians have when they studied music in years gone by when there was no radio? In my opinion, that is not a good argument. I understand that these children in Interlochen rehearse all week for one program, but again I say, the broadcast is intended to commercialize the Interlochen Camp.

Let us see what the American Federation of Musicians has done for the happiness of the home in supplying good music. Today, as in the past, its symphony orchestras are permitted to go over the air without any charge to the broadcasting companies. Its name bands are also permitted to go over the air without any extra charge to the broadcasting companies. The final result is that the public gets the benefit. I can truthfully say that for every dollar the broadcasting companies pay for musicians they receive $4.00 worth of music gratis. Keep in mind now that I am speaking of the professional musicians, members of the American Federation of Musicians. Is this not a contribution to our great country and musical culture?

It has been said in the press that I am a "czar" and "dictator," and that the only music that goes over the air is the kind of music permitted by me. This I say is not true. You must be aware of the fact that some eighteen months ago the broadcasting companies told the public that they would not hear American Society of Authors, Composers and Publishers (ASCAP) music, and therefore the public did not hear ASCAP music for nine months. In this case, the finest writers and the finest music were

taken off the air because the broadcasting companies said "NO." Because of the ASCAP-Radio fight, some of our conductors who have music libraries worth as much as $100,000.00 were prevented from playing their music over the air. Was this fair to the public?

I personally received my musical education in the Hull House School in Chicago, which in those days was conducted by Miss Jane Addams. I was one of the members of the school band. From there I went to the Chicago Daily News Band; so I came from the amateur school, like many other professional musicians of today, and we did not play over the radio. In those days we were not used under the guise of education to commercialize someone's institution.

I was very much surprised to read in the press release your reference to the colored question. The white and colored members of the American Federation of Musicians have worked together since its inception. As far as I know there has never been any discrimination against our colored members. However, I welcome investigation of this matter by anyone.

I also read in a press release, supposedly coming from you, that if we stopped the making of recordings and transcriptions, 500 radio stations and many taverns and cafes which cannot employ musicians, will be put out of business. There are some 500,000 juke boxes in the United States and Canada. These juke boxes alone have taken the jobs of approximately 8,000 live musicians. There are approximately 500 radio stations which do not employ a single live musician. These radio stations are all classified as big business. They say they need the services of the American Federation of Musicians, but only in the canned kind of music. This part of our business takes away several thousand more musicians who would be employed if we did not make the canned music, to say nothing about the taverns and cafes using Muzak, recordings, etc.; etc.

Members of the American Federation of Musicians received $3,000,000.00 annually for making canned music. This $3,000,000.00 worth of canned music, when distributed around the United States and Canada, takes the place of

live musicians who would receive for their work approximately $100,000,000.00. Certainly no one can say this is a healthy condition.

It is said that without our assistance these places would go out of business. The question is, who shall go out of business first? It is not our intent to put anyone out of business. Why can't we all live? Why should all big revenues go into the pockets of these radio stations, officials and others, without paying one dollar to the musicians?

The action of the convention of the American Federation of Musicians in stopping recordings was not taken on the impulse of the moment. It was taken after some fifteen years of deliberation, when the patience of the entire 138,000 members of the American Federation of Musicians was exhausted. Again I repeat, this was not the action of the President of the American Federation of Musicians; it was the action of the entire membership of the Federation.

It may be surprising to the public to know that 95 per cent of the music in the United States and Canada heard today is canned music. Only 5 per cent is left for the poor professional musician who studied all his life so that he might make a living for his family. This is not a question of being a "czar" or a "dictator." It is a question of a large group of men fighting for their very existence.

Insofar as I personally am concerned, and as long as I am the President of the American Federation of Musicians, I shall encourage such action on the canned music situation until such time as these people who are getting rich on our services while our people get no money, see fit to employ members of the American Federation of Musicians.

I will cite one case pending at this very moment. A strike was called on the Ringling Brothers Circus last June 1st, for a mere increase of $2.50 per man per week. The show included fourteen colored musicians and twenty-six white musicians. These men have been out of a job ever since June 1st, because the circus bought records *made by our members*. These records are now playing the show. In other words, our own men are scabbing on our men. Would anyone say this is a healthy condition? If we had not made these records, these forty men would not be walk-

ing the streets without jobs. I would like to have someone point out to the Federation any worker in any other line of business who makes the instrument which puts himself out of business. Incidentally, the circus offered to settle this strike by taking back the white musicians, and eliminating the colored musicians; but we said the white as well as the colored men went out together, and it was only fair that they go back together.

The ice man was put out of business because the frigidaire was installed in the home; but the ice man had nothing to do with the making of the frigidaire. Many, many other labor saving devices have been created where the displaced worker had nothing to do with the making of same. In our case, it is entirely different. We make the instrument which puts us out of business. To continue this policy means suicide for the musicians of the United States and Canada.

Not one recording or transcription company has approached the American Federation of Musicians with any suggestion to overcome this problem.

They sit back and say, "we will all combine—the radio stations, recording companies, advertising agencies—and we will bring pressure on Washington to fight our battles for us." That is just what has been done. While the Government is spending its good time and money protecting all these interests who have combined against the American Federation of Musicians, irrespective of any action taken, the American Federation of Musicians must protect itself with its own resources. This is very unfair. Am I to assume that these companies are lily-white, and are not to be investigated in the same manner as the American Federation of Musicians in this controversy? No agency, not even the agencies of the Government, has asked the American Federation of Musicians to explain the situation. All we have been getting are threats through the press that unless we do this, that or the other thing, we are going to have this or that done to us. The American Federation of Musicians resents any thought in the minds of any one questioning the patriotism of that organization or its members. No organization has bought more War

Bonds pro rata than have the members of the American Federation of Musicians. Until now, the American Federation of Musicians has O.K.'d millions of dollars', I repeat, millions of dollars' worth of music to be played free for the armed forces of the United States and its Allies, and will continue to do so. Insofar as breaking down the morale of our fighting men is concerned if we do not make records, I repeat now what I said at our convention last June 8th, that we will make recordings and transcriptions for the armed forces of the United Nations, and we will make any records requested by the President of the United States.

But we cannot make canned music for commercial industries which are getting rich while the musicians walk the streets without jobs. We will not permit any industry to hide behind the Nation's Flag, and place our members on relief rolls, while they continue to use the product made by us to deprive our members of the American way of living, and to raise their families in the democratic American way.

Mr. Fly, I hope that the above is the information that you desire. I am ready and willing at all times to be helpful to you and the Commission whenever you request. I will be very happy to furnish you with any further information desired.

Sincerely yours,

JAMES C. PETRILLO, President,
American Federation of Musicians.

(Seal)

APPENDIX B

The following letter is set forth on page 85 of hearings before the subcommittee of the Senate Committee on Interstate Commerce, 77th Congress, 2nd Session, pursuant to S. Res. 286, *Use of Mechanical Reproduction of Music*, 1942:

July 31st, 1942.

Mr. Elmer Davis, Director,
Office of War Information,
Washington, D. C.

My Dear Mr. Davis:

In answer to your letter to me of July 28th, 1942, please note that my pledge to the President of the United States and the People of the United States, continued in my letter of December 27th, 1941, to which you refer, will be kept by the American Federation of Musicians.

You say in part in your letter:

> "I am informed that if you enforce this edict three direct consequences will be the elimination of new electrical transcriptions for the use of radio stations, the elimination of new popular records for so-called 'juke boxes,' and the elimination of new popular and classical records for home consumption. I am further informed that this move in all probability will lead to court fights, possible strikes, and definitely curtailed musical service to the public in the critical months ahead—months which may well decide the fate of this country's war effort."

Electrical transcriptions for radio used as intended—once only—are not detrimental to the American Federation of Musicians if destroyed after such use. The proof of this is that some three weeks ago the World Broadcasting Company requested, and was promptly given permission, to make such electrical transcriptions for a period of twenty-six weeks for General Motors' employees working in our defense industries.

Members of the American Federation of Musicians will not play for the making of records for juke boxes. The juke box industry is strictly commercial, producing tremendous revenues for all interested parties except musicians. No soldier or civilian is allowed to hear that music without putting five cents in the machine. If a soldier has ten dances it costs him fifty cents. Most of the ballrooms of the country for an admission charge of twenty-five cents furnish excellent orchestras for all-night dancing.

I can tell by your letter that you have been absolutely misinformed throughout. You say that the American Federation of Musicians' action will stop popular-classical records for home consumption. This is not so. The musicians will make records for home consumption. At our Convention last June it was announced that the musicians will make recordings for the Armed Forces of the United States and its Allies; that they will make recordings for home consumption and will make recordings at the request of the President of the United States. Those promises will be kept.

I am sending you under separate cover a copy of the communication under date of July 30th, 1942, from us to Mr. James Lawrence Fly, Chairman of the Federal Communications Commission, on canned music, which will give you a clear picture. Believing you to be fair, I am sure you will realize after reading same that the American Federation of Musicians is justified in its action on canned music.

The American Federation of Musicians has a membership of 138,000. We did not request our members to send letters to Senators, Congressmen and different Department heads in Washington. We stand squarely on the merits of the issue and will meet it in the open on that basis. The radio interests, recording companies and other agencies connected with this controversy have circularized many Senators, Congressmen and Department heads in Washington with letters to bring pressure on the American Federation of Musicians. Can you imagine the letters that 138,000 members could send to Washington? We have not urged our people to do anything of that sort.

6c

The American Federation of Musicians stands second to none when it comes to patriotism. Not only do our name bands play gratis for the Armed Forces of America, but these same orchestras play for bond sales throughout the different cities in the United States without compensation and without any cost to the Government.

On April 1st, 1942, I received a communication from Nelson A. Rockefeller, Coordinator of Inter-American Affairs, requesting permission to record programs played by union musicians over radio broadcasts, such records to be sent to Latin-America. That request was promptly complied with. The point I would like to make is that Mr. Rockefeller stated that if the Government had to pay for these programs, it would cost $1,000,000.00. This approval was given to the Government without any compensation whatsoever. To quote Mr. Rockefeller's own language:

"It would mean that the United States Government would have to pay over a million dollars."

American Federation of Musicians' members have been working gratis in campaigns for the raising of money for the Navy and Army Relief, Russian Relief, Red Cross, etc.

They are cooperating 100 per cent with the Treasury Department in making recordings of radio studio bands without receiving any compensation from the Government. Their services are also used by the Treasury Department in the selling of War Bonds, all without any compensation, which means that they can record and dub recordings. These recordings can then be distributed to the different radio stations in the United States. The musicians have also donated their live talent to the Treasury Department without any compensation.

The United States Department of Agriculture inaugurated ten dramatic programs for the Soil Conservation and National Defense. We approved their request to re-record this music so that it could be sent to other stations without any compensation.

We are cooperating wholeheartedly with the Department of Justice in many of the foreign language radio programs.

I repeat and confirm the following from my letter of December 27th, 1941:

> "To this new slogan, this new theme for the new year, then, the Federation dedicates itself: *Music For Morale.*"

You have made an appeal to me. I am only a messenger for 138,000 musicians who have, through their Convention, ordered the step taken by the American Federation of Musicians in the recording situation. Realizing that our Government comes first, if we thought for one moment we were doing anything to hurt morale, you may rest assured that the American Federation of Musicians would not stand in the way. Our record proves that.

We refute any suggestion that we are lacking in patriotism. We will not permit hypocrisy on the part of the interests who are fighting us to hide behind the American Flag, which Flag belongs not only to a few but to all Americans, including the musicians who are striving to earn a livelihood.

The above does not begin to tell the entire story as to how far the American Federation of Musicians and its Locals are cooperating with the United States Government.

I cannot grant your request to cancel the notice that the American Federation of Musicians' members will not play for transcriptions or records. That notice, however, does not apply to recording for the Armed Forces of the Nation or for the President of the United States.

The American Federation of Musicians will continue to cooperate with the various Governmental Departments as heretofore with respect to free music. We will do the same for the War Department, the Navy Department, the Marine Corps, the Coast Guard, the Office of Civilian Defense and the Office of War Information.

Sincerely yours,

JAMES C. PETRILLO, President,
American Federation of Musicians.

APPENDIX C

Why Foreign Broadcasts Must Be Regulated

The following article appears in the March, 1946, issue of the *International Musician:*

In reaffirming the regulation of foreign broadcasts of musical programs the American Federation of Musicians is acting to protect the economic interests of its membership in the United States and Canada in a manner that is entirely consistent with the traditional and approved policies and practices of this country as well as those of foreign countries. It requires no extensive elaboration to demonstrate that, should foreign musical broadcasts be unregulated, then the standards and conditions of the United States and Canadian musicians would be directly threatened and eventually undermined. It would become the simple situation of high standard American labor being exposed to the overwhelming competition of low standard foreign labor.

That competition is the underlying basis of our whole pattern of foreign trade relations. Every tariff law that has been enacted by Congress has been motivated and justified by the natural desire to protect the American investor, the American farmer, and the American worker against the ravages of such competition.

Similarly, largely at the direct insistence of organized labor, Congress has for many years now adopted and implemented a policy of severe restrictions on immigration. Here, again, the plain objective has been the preservation of employment opportunities and standards of the American worker.

If it is desirable and necessary to limit and regulate the number of persons who may lawfully immigrate into this country, how much greater the desirability and necessity of regulating foreign musical broadcasts. Where persons come to this country they are at best a very small minority. They are not disposed to tear down American wage standards because there is a natural tendency on their part to

seek the wages and standards prevailing in this country; also the American worker has the opportunity of controlling the situation since the workers are resident in America. The American worker can and does effectively insist that the employer maintain the same conditions for the immigrant worker as obtained for the American worker. Such, of course, is hardly the situation as respects the competition of foreign broadcasts. It goes without saying that the American Federation of Musicians cannot and will not exercise any influence over the standards and wages of foreign musicians working in foreign lands. And, since the working standards and wages of the American musician are infinitely superior to those of any foreign musician, and since the foreign musician can render his services in any American home without leaving his native land, it follows directly and irrefutably that foreign musical broadcasts constitute the most striking instance of unregulated competition between high American and low foreign standards.

Neither the general problem, nor the methods of meeting it, are, as I have already shown, by any means new. It is interesting to note, however, that as long ago as 1917 the Congress of the United States took action with respect to this problem as it specifically affects the musician. The Act of February 5, 1917, flatly prohibited the entry of contract laborers. Thereafter, and in order to make it crystal clear that musicians came within the provisions of that act, Congress enacted an amendment providing:

> "The contract labor provisions of the immigration laws shall be applicable to alien instrumental musicians, whether coming for permanent residence or for a temporary period"

So far as the American musician is concerned there is, of course, no difference whatever between contracting for a foreign band to appear in person in this country and contracting for a foreign band to broadcast to this country. In both instances the foreign musician is displacing the American musician. Both the language and policy of the

above quoted law completely support the recent action of the American Federation of Musicians in connection with the regulation of foreign musical broadcasts.

Nor is the principle in America unique. All countries faced with the same problem resort to the same or similar measures of self-protection. England, for example, protects its film industry by imposing a definite quota on American films and requires that specific percentages of money be spent for British labor in the making of British films compared with the labor cost of American imported films. Moreover, England, France and other democratic countries go even farther than the United States in their control of foreign labor. Any immigrant who comes to the United States within the established quotas may proceed to work at any job he can find. In European countries, however, immigrants must obtain governmental permits before they are entitled to work. And those permits are never issued where the result would be the work displacement by those immigrants of citizens of those countries.

For the foregoing reasons the International Executive Board reaffirmed its position with respect to foreign broadcasts.

It seems strange, indeed, to contrast the wide-spread support of our traffic and immigration policies with the artificial furore which has been manufactured by the press over the Federation's recent action which merely reestablished the conditions existing prior to the war. Actually, it is not so strange at all. It is but an extension of the bitter and highly financed publicity campaign launched by those employers of musicians who have fought the progress of the American Federation of Musicians in improving the conditions of its members every inch of the way. And throughout that bitter and unscrupulous campaign truth and consistency have never been adhered to.

JAMES C. PETRILLO, President,
American Federation of Musicians.

APPENDIX D

Extract from Report of Proceedings of Sixty-Second Annual Convention of the American Federation of Labor:

Supplemental Report of the Executive Council

The Executive Council submits the following declaration for consideration and action by this convention:

For a period of years the American Federation of Musicians has been engaged in a labor dispute with manufacturers of records and transcriptions, and with broadcasting companies over practices of the said employers, which have caused the unemployment of thousands of musicians affiliated with the American Federation of Musicians. The employers have not shown a disposition to resolve this important controversy and it became necessary for the members of the American Federation of Musicians to cease work in the making of records and electrical transcriptions. By unanimous action of a duly accredited convention of the American Federation of Musicians, held at Seattle, Washington, June, 1941, its President was directed to inform all members of the American Federation of Musicians to cease work in the making of records and electrical transcriptions. As a result of such order of the convention, the Anti-Trust Division of the Department of Justice has instituted a suit against the American Federation of Musicians in an effort to further the individual economic views of the head of said department, which views threaten the destruction of free trade unionism and have been previously repudiated by the decisions of the Supreme Court of the United States.

The civil suit instituted by the Anti-Trust Division of the Department of Justice unfairly aids employers in their arbitrary resistance to a fair and equitable solution of the dispute. The objectives sought by the Anti-Trust Division of the Department of Justice would prohibit the use of peaceful measures in labor disputes, would deny the exercise of freedom of speech, and would impose involuntary servitude upon the workers of the country. Therefore,

the American Federation of Labor condemns the Anti-Trust Division of the Department of Justice for its persistent campaign to destroy constitutional rights of a free and democratic labor movement. The American Federation of Labor gives unqualified support to the American Federation of Musicians in its just struggle to protect the skill and employment opportunities of its members from the destructive inroads made by the arbitrary and unrestricted competition of labor displacing mechanical devices which the Musicians are continually called upon to help to manufacture with the result of destroying their own employment opportunities, which, without their help, could not be done.

American Federation of Musicians

Resolution No. 68—By Delegate C. J. Haggerty, California State Federation of Labor.

WHEREAS, The American Federation of Musicians in convention assembled in Seattle, Washington, during the month of June, 1941, did instruct the International President James C. Petrillo and the Executive Board of the American Federation of Musicians to make certain decisions regarding the making of records and electrical transcriptions by members of the American Federation of Musicians, the unauthorized use of which have completely eliminated musicians' jobs where they previously existed, and

WHEREAS, Pursuant to this demand on the part of the rank and file membership of the American Federation of Musicians through the duly authorized and accredited delegates to the convention representing 145,000 organized musicians in the United States and Canada, the International President of the American Federation of Musicians, James C. Petrillo, at the convention of the A. F. of M. held in Dallas, Texas, June 6th, 1942, expressed the will of the aforesaid 145,000 members of the A. F. of M. by decreeing that on and after August 1, 1942, the members of the

A. F. of M. would cease the making of recorded music and electrical transcriptions except for the use of the armed forces of our country, for non-commercial use in the home, or at the request of the President of the United States, and

WHEREAS, The distortions and glaring inaccuracies by a section of the Press have confused the public mind for the deliberate purpose of creating disunity and to discredit organized labor's part in the war effort despite the fact the American Federation of Musicians has every just reason to be proud of the inestimable record of occasions on which the locals and members comprising the Federation have donated freely of their time and money to the armed service, in the sale of war bonds, in Red Cross drives and everything connected with the war effort in general, therefore, be it

RESOLVED, That the American Federation of Labor in convention assembled expresses its confidence in the judgment of the International President of the American Federation of Musicians, James C. Petrillo, and the 590 accredited delegates to the Dallas Convention of the A. F of M. in their back-to-the-wall endeavor to retain the last vestige of employment for the union musicians, and be it further;

RESOLVED, That copies of this resolution be sent to Senator Clark of Idaho, Chairman of the Senate Investigating Committee, C. C. Fly, Chairman of the Federal Communications Commission, Elmer Davis, Chairman of the Office of War Information, James C. Petrillo, President, American Federation of Musicians.

Report of Committee

The American Federation of Musicians has for many years suffered severely because more than half of its one hundred and thirty-eight thousand members are unemployed. This unemployment is due, chiefly, to the fact that records and electrical transcriptions are being used in the

transmission of musical entertainment to the public to such a degree that ninety-five per cent of all music heard today in the United States and Canada is what is commonly known as "canned music." Only five per cent is played by live musicians.

While a tremendous industry has sprung up in the use of music through the radio, and hundreds of millions of dollars are derived by these companies as a result of the use of music, very little of this return comes to the musicians because of the use of mechanical devices for the transmission of the music. The companies engaged in the manufacture of records and in the broadcasting industries find it profitable to dispense with the use of live musicians and to use these mechanical devices in connection with great advertising enterprises.

The American Federation of Musicians has for many years sought a solution to this unemployment problem. The manufacturers and broadcasting companies have shown no disposition to find ways and means whereby the unemployment created by their industry can be alleviated to a degree which would be fair and equitable.

Thus the employment and income of musicians are steadily decreasing while that of the record manufacturers and broadcasting companies is growing in staggering proportions. All the musicians have sought is a sensible and reasonable solution to the problem. All they want is that the employer assume a portion of the burden and examine the problem with a view of finding ways and means whereby the industry may go on but that the musician may live.

The American Federation of Musicians, at its convention held June, 1941, in Seattle, Washington, unanimously voted to direct its president to inform its members that they shall cease work in the manufacture of records and electrical transcriptions. This direction has been put into force and effect; and, as a result, the employers in these industries, the press and the Anti-Trust Division of the Department of Justice have "ganged up" on the American Federation of Musicians and launched one of the most vicious campaigns in labor history in order to prevent a just and equitable solution of the problem.

The Anti-Trust Division of the Department of Justice has instituted a suit for an injunction, the purpose of which is to compel the musicians to make records upon any terms and conditions fixed by the employers.

No regard is shown by the Anti-Trust Division for the injustice perpetrated upon the musicians by the record manufacturers. No regard is shown for the policy so frequently expressed by the government in recent years—that unemployment must be averted. No consideration is given to the fact that the musician in this instance is called upon to make the device which contributes to his destruction.

The attention of your Committee has been directed to the testimony given by Mr. Arnold, head of the Anti-Trust Division, before the Committee of the United States Senate, which undertook to launch an investigation of the action taken by the Convention of the American Federation of Musicians.

The Committee's attention has also been directed to the brief compiled by Mr. Arnold in the suit which he has brought against the American Federation of Musicians. In that brief, there appears the following startling statement:

> "In summary, we submit that the phrase 'terms or conditions of employment' assumes that there is a master who directs the work and a servant who obeys those directions. The function of the master is to determine what work he wants done, what machines he will use, what goods or services he will furnish, and the customers to whom he will sell those goods and services. In so far as the servant demands the power to determine any of these questions he is no longer a servant. He has become the master. He is an entrepreneur in business. A union cannot, under the pretext of improving terms or conditions of employment, use organized coercion to destroy the right of the employer to conduct his business in an efficient way and to use his best judgment as to the goods he will sell, the customers to whom he will sell them, and his relationship with other independent organizations . . ."

That statement has not been extracted from an ancient text justifying the institution of slavery. Nor is it the solemn observation of one who lived in that period of history when the very word "union" was anathema, and those workers who dared to join together into unions, vicious and ignominious criminal conspirators.

That statement is made by one who presumes to speak for the United States of America. It was published only a few days ago, on October 1st, 1942. And thus, at last, is frankly disclosed the true and vicious sentiments of this great crusader.

Are there words that can and will describe the indignity and insult thus heaped upon every man and woman in this country contributing their skill and energies in this war—in this war to end the tyranny implicit in the phrase "There is a master who directs the work and a servant who obeys those directions?"

You know that the true spokesmen and interpreters of the policies of our country could not even have thought, much less printed, a concept so directly subversive to the institution of democracy. The right of free men and women not to obey the arbitrary directions of a master is the very essence of our democratic institution.

We say, with full awareness of the implications of this statement, that Mr. Arnold's comment injects a dangerous, discordant and disuniting note in the concerted efforts of our public war officials to achieve full and enthusiastic production for the war effort.

If there be any merit or substance to Mr. Arnold's comments, then the efforts of organized labor to obtain greater voice in shaping the policies and methods of law constitute a violation of law. If there be any merit or substance to Mr. Arnold's comments, then every constructive suggestion made by any American worker, or by any American union for a proper use of the masters' machines is in violation of law. If there be any merit or substance to Mr. Arnold's comments, then the entire effort of the War Production Board to establish joint labor management production committees is a violation of the law. If there be any merit or

substance to Mr. Arnold's comments, then the workers of this country, lest they be exposed to prosecution—and persecution—by Mr. Arnold, must stand by in mute and servile silence while their so-called masters—blind to the public needs of war, and driven only by desire for profits—abuse and exploit their machines and their "servants" to their own selfish ends. Such is the dictum of Assistant Attorney General, Thurman Arnold.

Thus, the controversy is much broader and more comprehensive than an isolated dispute with the American Federation of Musicians. It involves a principle affecting the rights of all organized labor. Only by the vigorous support of the American Federation of Musicians can the establishment of this ruthless, undemocratic and unjust principle be averted.

Therefore, your Committee recommends the adoption of the Supplemental Report of the Executive Council and Resolution No. 68.

Vice-President Wolf moved the adoption of the committee's report.

The motion was seconded and carried by unanimous vote.

SUPREME COURT OF THE UNITED STATES

No. 954.—October Term, 1946.

The United States of America, Appellant, v. James C. Petrillo.	Appeal From the District Court of the United States for the Northern District of Illinois.

[June 23, 1947.]

Mr. Justice Black delivered the opinion of the Court.

The District Court dismissed a criminal information filed against the respondent, James C. Petrillo, on the ground that the statute on which the information was founded was unconstitutional. 68 F. Supp. 845. The case is here on direct appeal by the Government as authorized by the Criminal Appeals Act. 18 U. S. C. Supp. V § 682. The information charged a violation of the Communications Act of 1934, 48 Stat. 1064, 1102, as amended by an Act of April 16, 1946, — Stat. —. The specific provisions of the Amendment charged to have been violated read:

"Sec. 506. (a) It shall be unlawful, by the use or express or implied threat of the use of force, violence, intimidation, or duress, or by the use or express or implied threat of the use of other means, to coerce, compel or constrain or attempt to coerce, compel, or constrain a licensee—

"(1) to employ or agree to employ, in connection with the conduct of the broadcasting business of such licensee, any person or persons in excess of the number of employees needed by such licensee to perform actual services; or

. . . . . .

"(d) Whoever willfully violates any provision of subsection (a) or (b) of this section shall, upon conviction thereof, be punished by imprisonment for not

more than one year or by a fine of not more than $1,000, or both." Pub. L. No. 344, 79th Cong., 2d Sess.

The information alleged that a radio broadcasting company, holding a federal license, had, for several years immediately preceding, employed "certain persons who were sufficient and adequate in number to perform all of the actual services needed . . . in connection with the conduct of its broadcasting business." The information further charged that the respondent, Petrillo, "wilfully, by the use of force, intimidation, duress and by the use of other means, did attempt to coerce, compel and constrain said licensee to employ and agree to employ, in connection with the conduct of its radio broadcasting business, three additional persons not needed by said licensee to perform actual services . . . ."

The coercion was allegedly accomplished in the following manner:

"(1) By directing and causing three musicians, members of the Chicago Federation of Musicians, theretofore employed by the said licensee in connection with the conduct of its broadcasting business, to discontinue their employment with said licensee;

"(2) By directing and causing said three employees and other persons, members of the Chicago Federation of Musicians, not to accept employment by said licensee; and

"(3) By placing and causing to be placed a person as a picket in front of the place of business of said licensee."

The only challenge to the information was a motion to dismiss on the ground that the Act on which the information was based (a) abridges freedom of speech in contravention of the First Amendment; (b) is repugnant to the Fifth Amendment because it defines a crime in

terms that are excessively vague, and denies equal protection of the law and liberty of contract; (c) imposes involuntary servitude in violation of the Thirteenth Amendment.[1] The District Court dismissed the information, holding that the 1946 Amendment on which it was based violates the First, Fifth, and Thirteenth Amendments.

Two general principles which concern our disposition of appeals involving constitutional questions have special application to this case: We have consistently refrained from passing on the constitutionality of a statute until a case involving it has reached a stage where the decision of a precise constitutional issue is a necessity. The reasons underlying this principle and illustrations of the strictness with which it has been applied appear in the opinion of the Court in *The Rescue Army* v. *Municipal Court*, 331 U. S. —, —, and cases there collected. And in reviewing a direct appeal from a District Court under the Criminal Appeals Act, *supra*, our review is limited to the validity or construction of the contested statute. For "The Government's appeal does not open the whole case." *United States* v. *Borden Co.*, 308 U. S. 188, 193.

First. One holding of the District Court was that, as contended here, the statute is repugnant to the due process clause of the Fifth Amendment because its words, "number of employees needed by such licensee," are so vague, indefinite and uncertain that "persons of ordinary intelligence cannot in advance tell whether a certain action or course of action would be within its prohibition . . ." The information here, up to the place where it specifically charges the particular means used to coerce the licensee, substantially employs this statutory language. And the motion to dismiss on the ground of vagueness and indefi-

[1] Another ground, not argued here, was that the Act represents an exercise of power by Congress not delegated to the United States.

niteness squarely raises the question of whether the section invoked in the indictment is void *in toto*, barring all further actions under it, in this, and every other case. *Cf. United States* v. *Thompson*, 251 U. S. 407, 412. Many questions of a statute's constitutionality as applied can best await the refinement of the issues by pleading, construction of the challenged statute and pleadings, and, sometimes, proof. *The Rescue Army* v. *Municipal Court*, *supra*; *Watson* v. *Buck*, 313 U. S. 387, 402. *Borden's Company* v. *Baldwin*, 293 U. S. 194, 204; 210, and concurring opinion at p. 213. But no refinement or clarification of issues which we can reasonably anticipate would bring into better focus the question of whether the contested section is written so vaguely and indefinitely that one whose conduct it affected could only guess what it meant. Consequently, since this phase of the appeal raises a question of validity of a statute within our jurisdiction under the Criminal Appeals Act, *supra*, and is ripe for our decision, we turn to the merits of the contention.

We could not sustain this provision of the Act if we agreed with the contention that persons of ordinary intelligence would be unable to know when their compulsive actions would force a person against his will to hire employees he did not need. *Connally* v. *General Construction Co.*, 269 U. S. 385, 391; *Lanzetta* v. *New Jersey*, 306 U. S. 451. But we do not agree. Of course, as respondent points out, there are many factors that might be considered in determining how many employees are needed on a job. But the same thing may be said about most questions which must be submitted to a fact-finding tribunal in order to enforce statutes. Certainly, an employer's statements as to the number of employees "needed" is not conclusive as to that question. It, like the alleged wilfullness of a defendant, must be decided in the light of all the evidence.

Clearer and more precise language might have been framed by Congress to express what it meant by "number of employees needed." But none occurs to us, nor has any better language been suggested, effectively to carry out what appears to have been the Congressional purpose. The argument really seems to be that it is impossible for a jury or court ever to determine how many employees a business needs, and that, therefore, no statutory language could meet the problem Congress had in mind. If this argument should be accepted, the result would be that no legislature could make it an offense for a person to compel another to hire employees, no matter how unnecessary they were, and however desirable a legislature might consider suppression of the practice to be.

The Constitution presents no such insuperable obstacle to legislation. We think that the language Congress used provides an adequate warning as to what conduct falls under its ban, and marks boundaries sufficiently distinct for judges and juries fairly to administer the law in accordance with the will of Congress. That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. *Robinson* v. *United States*, 324 U. S. 282, 285–286. It would strain the requirement for certainty in criminal law standards too near the breaking point to say that it was impossible judicially to determine whether a person knew when he was wilfully attempting to compel another to hire unneeded employees. See *Screws* v. *United States*, 325 U. S. 91; *United States* v. *Ragen*, 314 U. S. 513, 522, 524, 525. The Constitution has erected procedural safeguards to protect against conviction for crime except for violation of laws which have clearly defined conduct thereafter to be punished; but the Constitution does not require impossible standards. The language here challenged conveys sufficiently

definite warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more.

Second. It is contended that the statute denies equal protection of the laws to radio-broadcasting employees as a class, and, for this reason, violates the due process clause of the Fifth Amendment. This contention, raised by the motion to dismiss, and sustained by the District Court as a ground for holding the statute unconstitutional as written; is properly before us, and we reach this equal protection ground, for the same reason that we decided the question of whether the section was unconstitutionally vague and indefinite.

In support of this contention it is first argued that if Congress concluded that employment by broadcasting companies of unneeded workers was detrimental to interstate commerce, in order to be consistent, it should have provided for the punishment of employers, as well as employees, who violate that policy.[2] Secondly, it is argued, the Act violates due process because it singles out broadcasting employees for regulation while leaving other classes of employees free to engage in the very practices forbidden to radio workers. But it is not within our province to say that because Congress has prohibited some practices within its power to prohibit, it must prohibit all within its power. Consequently, if Congress believes that there are employee practices in the radio industry which injuriously affect interstate commerce, and directs its prohibitions against those practices, we could not set aside its legislation even if we were persuaded that employer practices also required regulation. See *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 46. Nor could we strike down such legislation, even if we

[2] The Act does not prohibit radio broadcasters from voluntarily hiring more employees than they need.

believed that as a matter of policy it would have been wiser not to enact the legislation or to extend the prohibitions over a wider or narrower area. Here Congress aimed its law directly against one practice—compelling a broadcasting company to hire unneeded workers. There is nothing novel about laws to prohibit some persons from compelling other persons to act contrary to their desires. Whatever may be the limits of the power of Congress that do not apply equally to all classes, groups, and persons, see *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 584, we are satisfied that Congress has not transgressed those limits in the provisions of this statute which are here attacked.

Third. Respondent contends here, and the District Court has held, that the statute abridges freedom of speech by making peaceful picketing a crime. It is important to note that the statute does not mention picketing, peaceful or violent. The proposed application of the statute to picketing, therefore, does not derive from any specific prohibition written into the statute against peaceful picketing. Rather it comes from the information's charge that respondent attempted to compel the licensee to hire unneeded employees by placing "a picket in front of the place of business of (the) . . . licensee." Yet the respondent's motion to dismiss was made only on the ground that the statute, as written, contravenes the First Amendment. In ruling on this motion, the District Court assumed that because "there was no charge of violence, . . . the placing of a picket must be regarded . . . as peaceful picketing." From this assumption, it concluded that "the application [of the statute] here sought to be made violates the First Amendment by its restriction upon freedom of speech by peaceful picketing." Thus, rather than holding the statute as written to be an unconstitutional violation of the First Amendment, the District Court ruled on the statute as

it was proposed to be applied by the information as it then read.

We consider it inappropriate to reach the merits of this constitutional question now. As we have pointed out, we have consistently said that we would refrain from passing on the constitutionality of statutes in advance of the necessity to do so. And the provisions for direct appeal from District Courts of certain criminal cases do not require us to pass on constitutional questions prematurely decided by a district court's dismissal of an information.

The information here, up to the place where it alleges the use of particular coercive means, charges in substantially the language of the statute that respondent coerced the licensee. The information's charges up to this point constitute a sufficient basis for a challenge to the statute on the ground that it contravenes the Constitution. Whether this part of the information, or the information as a whole, was adequate definitely to inform the respondent of the nature of the charge against him is another question. See *United States* v. *Lepowitch*, 318 U. S. 702, 704; *Potter* v. *United States*, 155 U. S. 438; *cf. United States* v. *Hess*, 124 U. S. 483. Had the District Court postponed ruling on the First Amendment question raised by the motion to dismiss, or had it denied the motion, respondent could have sought a bill of particulars, apart from attacking the constitutionality of the Act. See *Husty* v. *United States*, 282 U. S. 694, 702; *Bartell* v. *United States*, 227 U. S. 427, 433–434; *Dunbar* v. *United States*, 156 U. S. 185, 192. So also, if the additional allegations describing the means used to accomplish the proscribed purpose were not definite enough for the court to determine whether they were sufficient in law to charge an offense, and if such allegations were not mere surplusage, see *United States* v. *Socony-Vacuum Oil Company*, 310 U. S. 150, 222, a challenge could have been

made to the information, see *United States* v. *Hess*, *supra*, at 487–488, as distinguished from a challenge to the statute on which it rested. In that event, and upon a holding of insufficiency of the information, appeal by the United States would have properly gone, under the Criminal Appeals Act *supra*, to the Circuit Court of Appeals, and if inappropriately brought here, that Act, as amended, 56 Stat. 271, would have required us to transfer the cause to the Circuit Court of Appeals. But no such challenge was made to the information.

We therefore have a situation in which we are urged to strike down a statute as violative of the constitutional guarantees of free speech when the statute has not been, and might never be, applied in such manner as to raise the question respondent asks us to decide. For the gist of the offense here charged in the statute and in the information is that respondent "wilfully, by the use of force, intimidation, duress *and* by the use of other means, did attempt to coerce, compel and constrain" [1] the licensee to hire unneeded employees. If the allegations that this prohibited result was attempted to be accomplished by picketing are so broad as to include action which either is not coercive, compelling or constraining, within the statute's meaning, or could not be constitutionally held to be, the trial court would be free, on motion of the respondent, to strike the particular allegations if they are surplusage. Rules of Criminal Procedure, § 7 (d). Or the Government might amend the information "at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." *Ibid.* § 7 (e).

The foregoing analysis shows that we are asked to rule on constitutional questions that are not yet precisely in issue. The question as it was decided by the District

[1] Italics supplied.

Court, was not the question raised by the motion to dismiss—whether the statute is invalid on its face—but whether it is invalid as it is proposed to be applied. And even if our decision could be evoked upon a showing that the statute, certainly, but for our intervention, would have punished respondent for peaceful picketing, there is no such certainty here. No final issue had been drawn. The information was still subject to amendment to fit, within the permissible area of amendments, the type of coercive means developed by further pleading or proof. See *Borden's Co.* v. *Baldwin*, *supra*, at 213. Further pleadings and proof might well draw the issues into sharper focus making it unnecessary for us to decide questions not relevant to determination of the constitutionality of the statute as actually applied. Thus this case had not reached a stage where the decision of a precise constitutional issue was a necessity. Consequently, we refrain from considering any constitutional questions except those concerning the Act as written. We do not decide whether the allegations of the information, whatever shape they might eventually take, would constitute an application of the statute in such manner as to contravene the First Amendment. We only pass on the statute on its face; it is not in conflict with the First Amendment.

Fourth. The District Court held, and it is argued here, that the statute, as sought to be applied in the information, violates the Thirteenth Amendment which prohibits slavery and involuntary servitude. This contention is also rooted in that part of the information which particularizes the means by which respondent attempted to compel action by the licensee, *i. e.*, by causing three musicians to discontinue, and three musicians not to accept, employment. The argument is that employees have a constitutional right to leave employment singly, see *Pollock* v. *Williams*, 322 U. S. 4, 17, 18, or in concert, and con-

sequently that respondent cannot be guilty of a crime for directing or causing them to do so. For the reasons given with reference to the picketing specification, therefore, we consider the Thirteenth Amendment question only with reference to the statute on its face. Thus considered, it plainly does not violate the Thirteenth Amendment. Whether some possible attempted application of it to particular persons in particular sets of circumstances would violate the Thirteenth Amendment is a question we shall not pass upon until it is appropriately presented.

Reversed and remanded.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

pp. 2 3

SUPREME COURT OF THE UNITED STATES

No. 954.—October Term, 1946.

The United States of America, Appellant, v. James C. Petrillo.	Appeal From the District Court of the United States for the Northern District of Illinois.

[June 23, 1947.]

Mr. Justice Frankfurter, concurring.

I agree with the Court's judgment and opinion because it holds that the Lea Act is not beyond the power of Congress to regulate commerce. I desire, however, to add a few words.

The constitutional basis for the legislation is the same as that upon which the validity of the Sherman Law rests. It is too late in the day to require argument or citation of cases in support of the right of Congress to free interstate commerce from obstruction that the exertion of monopolistic power may entail or from interference that may reasonably be deemed to promote monopoly. Equally clear is it that Congress may direct its legislation specifically towards a disclosed evil, without generalizing its prohibition, when in its judgment like evils have not disclosed themselves elsewhere. It would be a usurpation of the legislative authority for us to find that there was no basis in reason for the judgment of Congress that the public interest called for legislation to deal with what is colloquially called "featherbedding" in connection with the broadcasting business. Beyond that, it is not our province to go.

The District Court took a different view, and on defendant's motion dismissed this information on the ground that the statute is unconstitutional. 68 F. Supp. 845. Since the Court now holds that the statute is constitutional, the case goes back to the District Court.

The Court conjures up difficulties which I do not entertain. The case is here under the Criminal Appeals Act of 1907, 34 Stat. 1246, as amended by the Act of May 9, 1942, 56 Stat. 271, 18 U. S. C., Supp. V, § 682, whereby a direct review can be had of a district court judgment setting aside an indictment or information, if the decision of the district court is based "upon the invalidity or construction of the statute upon which the indictment or information is founded." Our decisions have construed this to mean that review can be had here only if a district court's decision was based exclusively upon the invalidity or construction of a statute. A criminal case cannot be reviewed here if questions of criminal pleading—defects not arising from the statute under consideration—enter into a decision sought to be reviewed. See *United States* v. *Hastings*, 296 U. S. 188, 192, 194; *United States* v. *Borden Co.*, 308 U. S. 188, 193; *United States* v. *Swift & Co.*, 318 U. S. 44. If both the sufficiency of criminal pleading and the validity or construction of the underlying statute were in issue before the District Court, and views as to both were interwoven in the court's decision, this Court has no jurisdiction to entertain the appeal. Under the Act of May 9, 1942, it must remand the cause to the appropriate circuit court of appeals. On the other hand, if the question of constitutional construction was the isolated ground of decision by a district court dismissing a federal prosecution, that is the only question to be considered here and it must be considered within the scope given it by the district court. Other questions may be imbedded in the case which may eventually come to the surface. But they are not to brought to the surface here under the limited, specific review given by the Criminal Appeals Act. It is to such implicit questions of pleading, and to statutory or constitutional questions not passed upon by a district court, that Mr. Chief Justice Hughes

had reference when he said, "The Government's appeal does not open the whole case." *United States* v. *Borden Co.*, *supra*, at 193.

There is no complication in the record before us to an exercise of our jurisdiction under the Criminal Appeals Act. The District Court's decision is wholly free from any ruling involving criminal pleading. He stated precisely what he deemed to be the sole issue before him and which alone he decided: "The only question before the court is the constitutional aspect of this statute as it was written by Congress. On this question the court is of the opinion that this statute is unconstitutional for the reasons above stated." 68 F. Supp. at 850.

We, therefore, have no acknowledgment or intimation by the District Judge that he had any difficulty with the information as a matter of pleading or that it carried any ambiguities which he resolved one way rather than another. If that were so, we would have no jurisdiction to review his decision. The District Court found constitutional defects in the statute "as it was written by Congress." We find the contrary. Therefore, the information should go back to the District Court for disposition. Just as we cannot go behind a district court's determination regarding the sufficiency of the indictment as a matter of pleading as a preliminary to passing on statutory validity, so, when a naked question of validity is presented to us, it is not for us to scrutinize the charge and hypothesize possibilities whereby new questions may arise of a statutory or constitutional nature.

SUPREME COURT OF THE UNITED STATES

No. 354.—October Term, 1946.

The United States of America, Appellant, v. James C. Petrillo,	Appeal From the District Court of the United States for the Northern District of Illinois.

[June 23, 1947.]

Mr. Justice Reed, dissenting.

I dissent from the opinion and judgment of the Court. My reason for disagreement is that § 506 (a) (1) of the Communications Act is too indefinite in its description of the prohibited acts to support an information or indictment for violation of its provisions. My objection is not to the words in the first paragraph of § 506 that make unlawful in labor matters the use of threats, force, violence, intimidation or duress against an employer. There is a background of experience and common understanding that ordinarily gives such words, when used in criminal statutes, sufficient definiteness to acquaint the public with the limits of the proscribed acts. When such words are used, they place upon those affected the risk of estimating incorrectly the sort of action that may ultimately be held to violate the statutes. *Nash* v. *United States*, 229 U. S. 373.

My objection is to the indefiniteness of the statutory description of the thing for which force must not be used—that is, "to compel" a licensee under the Communications Act "to employ . . . any person or persons in excess of the number of employees needed by such licensee to perform actual services."

This criminal statute is the product of legislation directed at the control of acts deemed evil by Congress. It is one of the many regulatory acts that legislative bodies have passed in recent years to make unlawful certain

practices in the field of economics that seemed contrary to the public interest.[1] These statutes made new crimes. Deeds theretofore not subject to punishment fall within the general scope of their prohibition. Common experience has not created a general understanding of their criminality. Consequently, in order to adequately inform the public of the limitations on conduct, a more precise definition of the crime is necessary to meet constitutional requirements.[2]

Anglo-American law does not punish citizens for violations of vague and uncertain statutes. There is no place in our criminal law for acts defined as detrimental to the interests of the state. A statute is invalid when "so vague that men of common intelligence must necessarily guess at its meaning." 269 U. S. at 391. It seems to me that this vice exists in this section of the challenged act. How can a man or a jury possibly know how many men are "needed" "to perform actual services" in broadcasting? What must the quality of the program be? How skillful are the employees in the performance of their task? Does one weigh the capacity of the employee or the managerial ability of the employer? Is the desirability of short hours to spread the work to be evaluated? Or is the standard the advantage in take-home pay for overtime work?

The Government seeks to avoid the difficulty by interpreting the section. Their brief says, after considering the legislative history, "the bill was not intended

[1] Emergency Price Control Act, 56 Stat. 33, § 205 (b), 50 U. S. C. App. § 925 (b); Fair Labor Standards Act, 52 Stat. 1069, § 16 (a), 29 U. S. C. § 216 (a); National Labor Relations Act, 49 Stat. 456, § 12, 29 U. S. C. § 162; Federal Corrupt Practices Act, as amended, 57 Stat. 167, § 9, 50 U. S. C. App. § 1509.

[2] *United States* v. *Cohen Grocery Co.*, 255 U. S. 81; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445; *International Harvester Co.* v. *Kentucky*, 234 U. S. 216; *Connally* v. *General Construction Co.*, 269 U. S. 385. *See Gorin* v. *United States*, 312 U. S. 19, 26.

to apply to mere differences of opinion as to whether men were overworked; it only fits deliberate demands for payment to additional employees made in complete disregard for the employer's need and without any justification from the viewpoint of actually getting the employer's business done. . . . If Paragraph (1) is read in its context, along with the succeeding paragraphs, it is clear what Congress was driving at when it characterized the Act as one to prevent extortion, as distinct from *bona fide* demands relating to conditions of employment." This interpretation seems to me to fly in the face of § 506 (1). There is another subsection to which the language might apply.[3] This clearly defines the prohibited acts. If the Congress wishes to fix the maximum number of employees that a licensee may employ in stations of various sizes, it may, of course, be done. Or, if it is impractical for Congress to act because of the varying situations, the number may be left to regulations of the Federal Communications Commission or other regulatory body.

This is a criminal statute. The principle that such statutes must be so written that intelligent men may know what acts of theirs will jeopardize their life, liberty or property is of importance to all. That principle requires, I think, a determination that this section of the Communications Act is invalid.

MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE join in this dissent.

---

[3] Pub. No. 344, 79th Cong., 2d Sess., 47 U. S. C. 506, § 506 (a) (4): "to pay or give or agree to pay or give any money or other thing of value for services, in connection with the conduct of the broadcasting business of such licensee, which are not to be performed;"